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UNITED STATES REPORTS

VOLUME 143

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1891

J. C. BANCROFT DAVIS

REPORTER

NEW YORK AND ALBANY
BANKS & BROTHERS, LAW PUBLISHERS
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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

MELVILLE WESTON FULLER, Chief Justice.

STEPHEN JOHNSON FIELD, Associate Justice.

JOSEPH P. BRADLEY, Associate Justice.

JOHN MARSHALL HARLAN, Associate Justice.

HORACE GRAY, Associate Justice.

SAMUEL BLATCHFORD, Associate Justice.

LUCIUS QUINTUS CINCINNATUS LAMAR, Associate Justice.

DAVID JOSIAH BREWER, Associate Justice.

HENRY BILLINGS BROWN, Associate Justice.

WILLIAM HENRY HARRISON MILLER, Attorney General.

WILLIAM HOWARD TAFT, Solicitor General.

JAMES HALL McKENNEY, Clerk.

JOHN MONTGOMERY WRIGHT, Marshal.

Mr. Justice Bradley died at his residence, in Washington, on the morning of January 22, 1892.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1891.

LOUISVILLE WATER COMPANY *v.* CLARK.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 1024. Argued November 23, 24, 1891. — Decided January 18, 1892.

The immunity from taxation conferred upon the Louisville Water Company by the legislature of Kentucky by the act of April 22, 1882, 1 Sess. acts, 1882, 915, was withdrawn by the general revenue act of May 17, 1886, Gen. Stats. 1888, c. 92.

The immunity from taxation granted to the company by the said act of 1882 was accompanied by the condition expressed in the act of February 14, 1856, 2 Rev. Stats. Ky. 121, and made part of every subsequent statute, when not otherwise expressly declared, that by amendment or repeal of the former act such immunity could be withdrawn.

The withdrawal of the exemption from taxation conferred upon the company by the act of 1882 put an end to the obligation, imposed upon the company by that act, to furnish water free of charge to the city for the extinguishment of fires, cleansing of streets, etc.

The acquisition by the sinking fund of the city of the stock of the water company, whether before or after the passage of the act of 1882, was subject to the reserved power of the legislature, at its will to withdraw the exemption from taxation, by amending or repealing that act.

THE court stated the case as follows:

The plaintiff in error brought this suit in the Louisville Law and Equity Court for Jefferson County, Kentucky, to obtain a decree preventing the seizure and sale of its property by the

defendant, the sheriff of that county, for State and county taxes assessed for the year 1887. The suit proceeds, in part, upon the theory that the company's property was exempted from all taxation by an act of assembly, passed April 22, 1882, which, it is alleged, constituted, in connection with previous enactments, a contract between it and the State, and that the general statute of Kentucky, relating to the collection of the public revenue, enacted in 1886, and under which alone the defendant could justify the contemplated seizure and sale, impaired the obligation of that contract. The relief asked was granted by the court of original jurisdiction, and the defendant was enjoined from collecting the taxes in question. That decree was, reversed by the Court of Appeals of Kentucky, and the cause was remanded with directions to require the plaintiff to pay into court the taxes claimed, or, if it failed in that, the management of its business should be entrusted to a receiver, until an amount sufficient to pay the taxes and costs of litigation was realized. To reverse that decree this writ of error was prosecuted.

Various statutes were referred to in argument as bearing upon the questions presented for determination. Their provisions, so far as it is material, in any view of this case, to advert to them, are as follows:

The Louisville Water Company was incorporated in 1854, without any exemption of its property from taxation, and with authority to establish and maintain, within or near the city of Louisville, reservoirs, engine-houses, pumping machinery, etc., necessary to furnish at all times an abundant supply of fresh and wholesome water to the inhabitants of that city. It was made its duty to furnish water to the city for the extinguishment of fires, and the cleansing of streets, upon such terms as might be agreed between itself and the municipal authorities; and, if the latter assented thereto, the water company was to have the exclusive right to furnish water to the inhabitants of Louisville, by means of pipes and aqueducts, upon such terms and for such time as might be stipulated between it and the city. Sess. Acts, 1853, 1854, vol. 2, p. 121.

Subsequently, by an act approved February 28, 1867, amend-

ing its charter, the water company was authorized, with the consent of the general council of the city, to increase its capital stock, and the city was invested with power to subscribe for such stock or any part thereof, and pay for the same in bonds issued for that purpose. Sess. Acts, 1867, vol. 2, p. 167.

By an act approved March 9, 1867, it was provided, among other things, that the general council of Louisville should not have power to pass ordinances diminishing the resources of the sinking fund of that city as then established, until the city's debts then, or which might subsequently become, chargeable upon that fund, were paid, and that the whole resources of that fund from year to year should be sacredly set apart to the payment of such debts, until they were fully discharged. The mayor, the president of the board of aldermen for the time being and three persons to be chosen by the general council on joint ballot, and their successors in office, were constituted the Commissioners of the Sinking Fund of the city of Louisville, with corporate powers and existence, with authority to do and perform all things necessary to execute the duties required and the powers given them by the act. The funds, estate and income belonging then or subsequently to that fund were vested in and placed under the control and management of said board of commissioners; if injured, withheld or abstracted, the board could sue for and recover the same, or any part thereof, in its corporate name. The commissioners were directed to apply the fund to the payment of the city's debts chargeable on the same when they could do so on fair terms, and when that could not be done, to invest the surplus in bonds of the city, or for which it was bound, or bonds of the State of Kentucky, or in such good and solvent stocks as might be approved on the vote of a majority of each board elect of the general council, by yeas and nays. Sess. Acts of 1867, vol. 2, pp. 417, 420.

A subsequent act, approved March 15, 1869, added to the resources of the sinking fund of the city the stock owned by it in the Louisville Water Company; also an annual tax of forty cents on each one hundred dollars' worth of such real and personal property as might be taxed for city purposes in that city,

to be levied and collected in cash as provided. It also provided that no other than the bonded debt of the city should be charged upon the sinking fund, unless provision was made for the payment thereof at the time of the charge sufficient in the opinion of the commissioners to pay it. Sess. Acts of 1869, vol. 2, p. 462.

The charter of the city of 1870 directed the general council to establish and maintain a fire department, with such force, organization, apparatus, engines, etc., as were sufficient to provide against fires, etc. By that charter it was further declared that the water works, as an institution of the city, should remain as then established by law, but the general council should not take further stock in the company without an ordinance first passed for that purpose, declaring the amount to be taken, how to be paid for, and the tax necessary to be levied to meet the same, which ordinance should be subject to approval or rejection by the qualified voters of the city at a general election called for that purpose; also, that no tax or water rent should be levied for the purpose of paying for the use of water for public purposes, or for paying the expense of conducting and managing the works, except upon the lands and tenements of the water district. Sess. Acts, 1869, 1870, vol. 2, pp. 30, 60, 61.

That charter was amended and the resources of the sinking fund were further increased by the acts of March 3, 1871, and March 21, 1871, investing the commissioners of the sinking fund with power to purchase from the city or from individuals holding the same, certificates of stock in the water company; such stock, when purchased, to be held as a part of the sinking fund of the city. Sess. Acts, 1871, vol. 1, pp. 323, 325; vol. 2, p. 352.

The 4th section of article 12 of chapter 92 of the General Statutes of Kentucky, adopted in 1873, made it "the duty of the president, treasurer or secretary of any gas or water company or association in this State to report, under oath, to the auditor of public accounts, on or before the 10th day of July every year, a full and complete statement of all property, real, personal or mixed, including buildings, engines, machinery,

pipes above and below ground, reservoirs, retorts, tanks, meters, lamp posts, together with any and all other species of property connected with or in any way belonging to or under the control of such gas or water company, and any surplus accumulated, or contingent fund on hand, cash on hand, stocks, bonds or other securities, and the total cash value thereof." The 5th section of the same article made it "the duty of the president, treasurer, secretary, mayor or agent of any toll-bridge company, incorporated city, mining or other incorporated or manufacturing company, gas or water company or association, in or doing business in this State, under or by virtue of any act of incorporation named in this article, to pay into the treasury, on or before the 10th day of October in each year, a tax upon each one hundred dollars of the value of the property owned, possessed, held or represented by such company, city or association, equivalent to the tax collected upon real estate." Gen. Stat. 1873, p. 745.

It should be here stated that by an act, approved February 14, 1856, entitled "An act reserving power to amend or repeal charters and other laws," it was provided, in respect to all charters and acts of incorporation granted after that date, that "all charters and grants of or to corporations, or amendments thereof, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: *Provided*, That whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested;" and that "when any corporation shall expire or be dissolved, or its corporate rights and privileges shall cease by reason of a repeal of its charter or otherwise, and no different provision is made by law, all its works and property, and all debts payable to it shall be subject to the payment of debts owing by it, and then to distribution among the members according to their respective interests; and such corporation may sue and be sued as before, for the purpose of settlement and distribution as aforesaid." 2 Rev. Stats. Kentucky, 121. This act was preserved in the General Statutes adopted in 1873, and was, in express terms, made applicable to all charters and

grants of or to corporations or amendments thereof, "enacted or granted since the 14th of February, 1856." Gen. Stats. Kentucky, 1873, p. 616.

Such were the relations between the State, the City of Louisville and the water company when the act of April 22, 1882, was passed, amending the charter of that company, and exempting it from the payment of taxes of all kinds, state, municipal and special. That act provided:

"1. It shall be the duty of the Louisville Water Company to furnish water to the public fire cisterns and public fire plugs or hydrants of the city of Louisville for fire protection free of charge.

"2. The sinking fund of the city of Louisville being the owner of the stock of the Louisville Water Company, and said water company by virtue thereof is the property of the city of Louisville, therefore the Louisville Water Company is hereby exempt from the payment of taxes of all kinds, of whatever character, state, municipal or special. This act shall take effect from and after its passage." Sess. Acts, 1882, vol. 1, p. 915.

It thus appears that when the act of 1882 was passed as well as ever since February 14, 1856, a general statute of Kentucky reserved the power to amend or repeal all charters and grants to corporations, or amendments thereof, "at the will of the legislature, unless a contrary intent be therein plainly expressed."

On the 17th of May, 1886, a general statute was passed, amending the revenue laws of the State. Acts 1885, 1886, pp. 140, 141, 202. This act has become chapter 92 of the General Statutes of 1888. It declares that "all property, real and personal, within this State, not herein expressly exempt by law, shall be assessed, as nearly as practicable, according to a uniform rate, in the manner hereinafter provided;" and contains a section similar to section 4 of article 12 of chapter 92 of the General Statutes of 1873. It is admitted that the property of the water company is subject to taxation under the act of 1886, unless it was entitled, after and notwithstanding its passage, to the exemption given by the act of April 22, 1882.

Argument for Plaintiff in Error.

The following sections of article 12 of the act of 1886 indicate the extent to which previous laws were affected by it: "§ 5. Chapter 92 of the General Statutes, the act of March 28, 1872, entitled 'An act to amend chapter 83 of the Revised Statutes, title Revenue and Taxation,' the amendment to said act of March 28, 1872, entitled 'An act to amend an act, approved March 28, 1872, authorizing sheriffs to sell real estate to pay revenue tax,' approved April 19, 1873, the act approved April 2, 1878, entitled 'An act to amend section 6, article 6, chapter 92 of the General Statutes,' an act to amend article 2 of chapter 92 of the General Statutes, title, Revenue and Taxation, approved May 8, 1884, and all other acts, general and special, and parts of acts inconsistent herewith, or not in conformity herewith, are hereby repealed; but nothing in this act shall interfere with any existing local option, or any special or prohibition law in any county, nor with any local or general law for creating or collecting county levy, or with chapter 1315 of the acts of 1879, 1880, or with an act entitled 'An act for the benefit of the Branch Penitentiary at Eddyville,' approved April 7, 1886.

"§ 6. Nothing in this act shall be held to repeal, or in any way impair, the force and effect of any local or special act, or any general law now in force, or that may hereafter be passed, providing for the appointment of collectors of state revenue or county levy and poll-tax, in any county of the State, nor shall anything herein be construed to repeal or impair the force of any special or local law giving to counties or towns, for road or street purposes, the fines collected for violations of the road and bridge laws of said county.

"§ 7. That this act shall take effect from and after September 14, 1886; but it shall not operate as a repeal of existing laws as to any assessment made, licenses granted or obligations or penalties incurred under any existing law."

Mr. William Lindsay and *Mr. T. L. Burnett* for plaintiff in error. *Mr. H. M. Lane* and *Mr. J. C. Burnett* were on their brief.

The act to amend the charter of the Louisville Water Company, approved the twenty-second of April, 1882, constituted a contract between the plaintiff in error and the State of Kentucky.

This statute, consisting of two sections, should be read as a whole, and construed in the light of all the previous legislation by that State on the subject, viz.: (1) The charter of the Louisville Water Company; (2) The charter of the city of Louisville; (3) The charter of the Commissioners of the Sinking Fund of the city of Louisville; (4) The act of the General Assembly of March 15, 1869, by which the stock in the Louisville Water Company, owned by the city of Louisville, was added to the resources of the sinking fund; (5) That by law all the resources of said sinking fund were to be held and sacredly used for the payment of the principal and interest of the bonded indebtedness of the city of Louisville, including the present and any future indebtedness of said city; (6) That the Louisville Water Company had, prior to April 22, 1882, furnished the public fire cisterns and public fire plugs or hydrants with water for fire protection, and that the city of Louisville had paid for such water; (7) That the said act of April 22, 1882, was accepted by the Louisville Water Company, and from that date to the present time the said water company has furnished to the public fire cisterns and public fire plugs or hydrants, an abundant supply of water for fire protection free of charge; (8) That the water thus furnished for fire protection to the city of Louisville, costs the Louisville Water Company $10,000 annually.

It is well settled that where a doubt arises in the construction of a statute, though it attaches only to a particular clause, the whole statute is to be considered together, in arriving at the legislative intent. *Commonwealth* v. *Duane*, 1 Binney, 601; *S. C.* 2 Am. Dec. 497; *Commonwealth* v. *Alger*, 7 Cush. 53, 89; *Nazareth Lit. Inst.* v. *Commonwealth*, 14 B. Mon. 266; *Bailey* v. *Commonwealth*, 11 Bush, 688; *Market Co.* v. *Hoffman*, 101 U. S. 112; *Berrida* v. *Silsby*, 21 How. 146, 161; *Nash* v. *Towne*, 5 Wall. 689.

It will not be argued that it was within the legislative

power to require the water company to furnish water for fire protection to the city free of charge. The same power had, by laws previously passed, authorized the parties to contract, one to furnish an abundant supply of water for that purpose, and the other to pay for it. It would not have been more flagrantly unreasonable or unlawful if in lieu of section 1 of the said act it had provided that the water company should pay all the taxes levied by the State on all the property in the city and in Jefferson County, or that the property of the water company should after that date be the property of the city or other corporation or person. To give such a construction would at once declare the first section a nullity and violate the well established rules of construction. If we follow the rules of construction, and take the whole statute together, it will be seen at once that the legislative power of the State made an offer of exemption from taxation, and the reason for such exemption was in consideration of the performance of the services therein named, which offer was accepted and the duties performed.

The object thus to be attained was a public one, for which the State could make such provisions by legislative enactment as in the judgment of the legislative department would best promote the public health and the public comfort, or the protection of public and private property. *Ohio Life Ins. Co.* v. *Debolt*, 16 How. 415; *New Orleans Water Works* v. *Rivers*, 115 U. S. 674; *Newport* v. *Light Company*, 84 Kentucky, 166; *Louisville Water Co.* v. *Hamilton*, 81 Kentucky, 517; *New Orleans Gaslight Co.* v. *Louisiana Light and Heat Producing Manufacturing Co.*, 115 U. S. 650; *Louisville Gas Co.* v. *Citizens Gas Light Co.*, 115 U. S. 683; *Gordon* v. *Winchester Building Ass'n*, 12 Bush, 114; *Mobile* v. *Kimball*, 102 U. S. 691; *State* v. *Morris Aqueduct*, 46 N. J. L. 495; *New Orleans* v. *Clark*, 95 U. S. 644; *Beekman* v. *Saratoga Railroad Co.*, 3 Paige, 44; *S. C.* 22 Am. Dec. 679; *Riche* v. *Bar Harbor*, 75 Maine, 91; *Indianapolis Water Works Co.* v. *Burkhardt*, 41 Indiana, 364; *Kane* v. *Baltimore*, 15 Maryland, 240; *Portland* v. *Portland Water Co.*, 67 Maine, 135; *Spring Valley Water Works* v. *San Francisco*, 52 California, 111; *Dingley* v. *Boston*, 100 Mass. 544.

In 1868 the General Assembly of Kentucky incorporated the Green and Barren River Navigation Company and conferred upon it such corporate powers and privileges as were deemed necessary to enable it to carry out the purposes of its creation. By a provision of the act of incorporation the State leased to the corporation for the period of thirty years the Green and Barren River line of navigation. After the organization of the corporation it complied with the condition of the proposed contract of lease, and took and held possession of the improvements for a number of years. In 1880 the legislature passed an act to repeal, in part, the act incorporating the company. The repeal applied to so much of the act as leased and conveyed to the navigation company the Green and Barren River line of navigation, and the benefits of tolls and revenues arising therefrom. The Court of Appeals of Kentucky held that this repeal could not be held to have divested the company of any of its rights, or to impair the validity of the contract. *Sinking Fund Comm'rs* v. *Green & Barren River Nav. Co.*, 79 Kentucky, 73, 81.

It is submitted that if the legislature can compel the water company to supply water to the fire department of the city of Louisville, free of charge, for the protection as well of the property of the State and Federal government as of the city and its people, and cannot exempt the property of the company from state taxation, or can withdraw the exemption at will, then the State may, in this way and to this extent, legitimately diminish this resource of the sinking fund.

Mr. James P. Helm and *Mr. Helm Bruce* for defendant in error.

Mr. Justice Harlan, after stating the case, delivered the opinion of the court.

The contention of the water company that it acquired by the act of 1882 an exemption from taxation which could not be withdrawn by subsequent legislation, without its consent, makes it necessary to inquire whether that exemption was in

fact thus withdrawn; and, if so, whether the statute withdrawing it impaired the obligation of any contract the company had with the State by the act of 1882.

It is clear that the exemption allowed by the act of 1882 was withdrawn by the general revenue statute of 1886. While the former act exempted the water company from taxation of whatever character, state, municipal or special, the latter subjected to taxation *all* property, real and personal, within the State, unless expressly exempted by its provisions. The act of 1886 not only failed to exempt the property of the water company from taxation, but expressly required, as did the General Statutes in force prior to 1882, (art. 12, § 4, c. 92,) that every water company doing business, within the State, should make, annually, a full and complete statement, under oath, of all its property, including its surplus or contingent fund, cash, stocks, bonds and other securities. And that there might be no possible doubt as to the scope of that act, the chapter of the General Statutes relating to taxation, and other statutes specially named by their titles, relating to revenue, and *all other* acts and parts of acts, "general *and special*," inconsistent or not in conformity with its provisions, were expressly repealed by the act of 1886. The sweeping character of this repeal is further shown by the specification of certain laws that were excepted from the repeal, which specification did not include the act of 1882. The latter act is special in its exemption of a particular company from taxation. It was, therefore, inconsistent with the revenue act of 1886, which embraced, in terms, all property, real and personal, within the State, not expressly exempted by its provisions from taxation. There is thus a positive repugnancy between the special and general act. This being so, the repealing clause included the special act of 1882, and, therefore, subjected the property of the water company to taxation as provided in the revenue act of 1886. In so holding, we do no violence to the established rule that repeals by implication are not favored, *State* v. *Stoll*, 17 Wall. 425, 431; *Ex parte Crow Dog*, 109 U. S. 556, 570; *Chew Heong* v. *United States*, 112 U. S. 536, 549; for, under the repeal of all special acts not in conformity with the general statute, the act of 1882, not being

expressly excepted from such repeal, cannot stand with that of 1886.

Was the repeal, which was effected by the revenue act of 1886, in violation of any rights acquired by the water company under the act of 1882? We think not. The act of 1882 contained no clause that "plainly expressed" the intention not to exercise the power, reserved by the statute of 1856, to amend or repeal, at the will of the legislature, all charters of or grants to corporations, or amendments thereof, and other statutes. There was no such reservation in the act of 1854, incorporating the water company, and, therefore, that act was subject to the general statute of 1856. *Hamilton* v. *Keith*, 5 Bush, 458. But, in respect to all the acts passed after 1856, amending the charter of, or relating to, the water company, including that of 1882, each must be read as if all the provisions of the act of 1856 were incorporated in it, because in no one of them is plainly expressed an intent to waive the right of amendment or repeal at the will of the legislature. In this view, the rights acquired by the water company under the act of 1882 were subject to the reserved power of amendment or repeal; saving, whenever that power was exerted, all rights previously vested. In short, the immunity from taxation, granted by the act of 1882, was accompanied with the condition — expressed in the act of 1856 and made part of every subsequent statute, when not otherwise expressly declared — that, by amendment or repeal of the former act, such immunity could be withdrawn. Any other interpretation of the act of 1856 would render it inoperative for the purposes for which, manifestly, it was enacted.

These conclusions are sustained by many adjudications. In *Tomlinson* v. *Jessup*, 15 Wall. 454, 457, which involved the liability to taxation of a corporation, an amendment of whose charter exempted it from taxation, this court said: "It is true that the charter of the company when accepted by the corporators constituted a contract between them and the State, and that the amendment, when accepted, formed a part of the contract from that date and was of the same obligatory character. And it may be equally true, as stated by counsel, that the ex-

emption from taxation added greatly to the value of the stock of the company, and induced the plaintiff to purchase the shares held by him. But these considerations cannot be allowed any weight in determining the validity of the subsequent taxation. The power reserved to the State by the law of 1841 authorized any change in the contract as it originally existed, or as subsequently modified, or its entire revocation. The original corporators, or subsequent stockholders, took their interests with knowledge of the existence of this power, and of the possibility of its exercise at any time in the discretion of the legislature. The object of the reservation, and of similar reservations in other charters, is to prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise if the public interest should at any time require such interference. It is a provision intended to preserve to the State control over its contract with the corporators, which, without that provision, would be irrepealable and protected from any measures affecting its obligation. There is no subject over which it is of greater moment for the State to preserve its power than that of taxation. . . . Immunity from taxation, constituting in these cases a part of the contract with the government, is, by the reservation of power such as is contained in the law of 1841, subject to be revoked equally with any other provision of the charter whenever the legislature may deem it expedient for the public interests that the revocation shall be made. The reservation affects the entire relation between the State and the corporation, and places under legislative control all rights, privileges and immunities derived by its charter directly from the State."

So in *Railroad Co.* v. *Maine*, 96 U. S. 499, 510, where the question was as to the liability to taxation of a consolidated corporation which came into existence while a general statute was in force, providing that any act of incorporation subsequently passed might be amended, altered or repealed at the pleasure of the legislature, in the same manner as if an express provision to that effect were therein contained, unless there was in the act of incorporation an express limitation or provision to the contrary. In that case the court said: "There was

no limitation in the act authorizing the consolidation, which was the act of incorporation of the new company, upon the legislative power of amendment and alteration, and of course there was none upon the extent or mode of taxation which might be subsequently adopted. By the reservation in the law of 1831, which is to be considered as if embodied in that act, the State retained the power to alter it in all particulars constituting the grant to the new company formed under it, of corporate rights, privileges and immunities. The existence of the corporation and its franchises and immunities, derived directly from the State, were thus kept under its control." To the same effect are *Railroad Co.* v. *Georgia*, 98 U. S. 359, 365; *Hoge* v. *Railroad Co.*, 99 U. S. 348, 353; *Sinking Fund Cases*, 99 U. S. 700, 720; *Greenwood* v. *Freight Co.*, 105 U. S. 13, 21; *Close* v. *Glenwood Cemetery*, 107 U. S. 466, 476; *Spring Valley Water Works Co.* v. *Schottler*, 110 U. S. 347, 352; *Louisville Gas Co.* v. *Citizens' Gas Co.*, 115 U. S. 683, 696; *Gibbs* v. *Consolidated Gas Co.*, 130 U. S. 396, 408; *Sioux City Street Railway* v. *Sioux City*, 138 U. S. 98, 108.

In harmony with these views is the decision of the Court of Appeals of Kentucky in *Griffin* v. *Kentucky Insurance Company*, 3 Bush, 592, where the question was as to the validity of an act, passed in 1868, repealing the charter of an insurance company, granted in 1865, and which did not expressly reserve the power of repeal. The court said: "The charter was certainly a contract with a legal obligation which could not be constitutionally impaired by ordinary legislation. But what is its obligation? Had the charter itself reserved the power to repeal it, that reservation would have been part of the contract, and have moulded its obligation accordingly; and such qualified obligation would not have been impaired by an exercise of that power." After observing that although there was no such reservation in the company's charter there was one in the act of 1856, the proviso of which, while securing the rights of beneficiaries and others, did not affect the mere power to repeal the franchise, the court proceeded: "That statute [1856] in its prospective operation is constitutional, and therefore a law of the State; and, as it has never been repealed, it

applies to the charter of 'The Kentucky Insurance Company,' unless, as argued, the non-reservation in the charter itself of power to amend or repeal it implied a repeal, as to it, of the general statute. But there being nothing in the language of the charter importing any such intention, if the mere pretermission of special reservation of the power to amend or repeal should be construed as a negation of the power, the statute of 1856 would be superflous and inoperative; because, in relation to charters reserving the power, there was no necessity for that enactment, which therefore was intended to operate only on charters which do not reserve the power already reserved by statute. Then, was this general reservation of power, like a special reservation in the charter itself, a part of the contract; or was the contract made subject to it, and the obligation defined or modified by it? We think so. And, whatever might be thought of the policy of such legislation, or of the policy or justice of the repealing statute over which the judiciary has no jurisdiction, our conclusion as to the mere power of repeal is, as we think, sustained by reason and abundant authority."

It is, however, contended that the exemption from taxation could not be withdrawn while the water company remained under the obligation imposed by the first section of the act of 1882 to furnish water to the city for fire protection, free of charge. But no such obligation remained after the passage of the act of 1886, which, as we have seen, had the effect to withdraw the immunity from taxation granted by the second section of the act of 1882. In determining the object and scope of the act of 1882, we must look at all of its provisions. The water company was under a duty by its charter, passed before the act of 1856, to furnish water for the extinguishment of fires and the cleansing of streets, not free of charge, but upon such terms as might be agreed upon by it and the city. And the legislature certainly did not assume to impose upon it the obligation to furnish water, for fire protection, free of charge, except in connection with the grant to it of immunity from taxation. Accepting, however, the benefits of this exemption from taxation, it became bound to supply

water for public purposes, free of charge. But that obligation remained only so long as the exemption continued in force. The act of 1882 is to be regarded as an entirety, and meant nothing more than that the company should furnish water for fire protection, free of charge, so long as the immunity from taxation continued. This view is in harmony with the act of 1856, which expressly declares that whilst privileges and franchises granted to corporations, after its passage, could be changed or repealed, no amendment or repeal should impair other rights previously vested. The effect of the withdrawal of the immunity from taxation was, therefore, to leave the water company in the position it was before the passage of the act of 1882 in respect to its right to charge for water furnished for public fire cisterns, fire plugs or hydrants.

Much reliance was placed by the plaintiff upon *Commissioners Sinking Fund* v. *Green and Barren River Navigation Co.*, 79 Kentucky, 73, 75, 83. But there is nothing in that case inconsistent with the views we have expressed. It was there decided that the legislature could not consistently with the constitution, or with the above statute of 1856, take from the Green and Barren River Navigation Company, without making compensation therefor, the right it acquired under a contract with the State, concluded in 1868, to take, for a term of years, tolls from vessels navigating Green and Barren Rivers, in consideration of its agreement, which had been fully performed, to maintain and keep in repair, at its own expense, such line of navigation. The case before us presents no such features. As already indicated, in losing an exemption from taxation the water company regained its rights to make such charges for water, furnished for fire protection, as it could rightfully have done before the act of 1882 was passed, and whilst its property was subject to taxation.

We have thus far considered the case as one between the State and the water company as a private corporation. It is not perceived that the result should be different if we regarded the case as one necessarily involving proprietary rights of the city of Louisville, or the rights of creditors whose debts were or are charged upon the sinking fund of that municipality.

The various acts referred to were passed, as was the act of 1882, in view of the general statute of 1856, and, as none of them contained a provision expressly waiving the right of amendment or repeal, it must be held, for the reasons already stated, that the acquisition by the sinking fund of the stock of the water company, whether before or after the passage of the act of 1882, was subject to the reserved power of the legislature, at its will, by amending or repealing that act, to withdraw the exemption from taxation. Such withdrawal did not impair the obligation of any contract rights of creditors whose debts were charged upon the sinking fund, because such rights, whenever acquired, were subject to the power to amend or repeal the statute granting to the water company immunity from taxation. The withdrawal of that immunity, it is suggested, impaired the value of such rights, but, in view of the reservation contained in the act of 1856, that result must have been regarded as possible when those rights were acquired. No right of any creditor has been impaired even in value, except as that result has followed from the reserved power to amend or repeal the statute in question. The act of 1886 has simply restored the water company and all persons interested in it, directly or indirectly, to the situation in which they were when the act of 1882 was passed, and the power to effect that result was reserved by the general statute of 1856, because not expressly waived by the act of 1882.

We, therefore, hold that it was competent for the legislature to withdraw the exemption from taxation granted by the act of 1882. The authority reserved in the act of 1856 to amend or repeal constituted a part of whatever contract was made by the act of 1882, and its exercise, in the present instance, cannot be said to have impaired the obligation of such contract, or, in any just sense, to have impaired rights previously vested.

Decree affirmed.

MR. JUSTICE GRAY concurs in the result.

DISTRICT OF COLUMBIA *v.* HUTTON.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 1338. Argued January 12, 1892. — Decided February 1, 1892.

Section 354 of Rev. Stat. Dist. Columb., providing that "no person shall be appointed to office, or hold office in the police force [of the District of Columbia] who cannot read and write the English language, or who is not a citizen of the United States, or who shall ever have been indicted and convicted of crime; and no person shall be appointed as policeman or watchman who has not served in the army or navy of the United States and received an honorable discharge" was repealed by the act of June 11, 1878, "providing a permanent form of government for the District of Columbia." 20 Stat. 102, c. 180.

Eckloff v. *District of Columbia*, 135 U. S. 240, affirmed as to the point that the act of June 11, 1878, 20 Stat. 102, c. 180, supplied to the District of Columbia for the first time a permanent form of government in the nature of a constitution.

United States v. *Tynen*, 11 Wall. 88, quoted and applied to the points: (1) that when there are two acts on the same subject effect is to be given to both, if possible; (2) that when two acts on the same subject are repugnant, the later operates to repeal the earlier to the extent of the repugnancy; and (3) that a later act, covering the whole subject of an earlier one, and embracing new provisions, showing that it was intended as a substitute for the earlier act, operates as a repeal of that act.

When a later act operates as a repeal of an earlier act of Congress, a subsequent recognition of it by Congress as a subsisting act will not operate to prevent the repeal.

THE court stated the case as follows:

This was an action by Harry S. Hutton against the District of Columbia to recover the sum of $182.50, with interest, alleged to be due him for salary as a member of the metropolitan police force of the District, from June 6, 1890, to August 20, of the same year.

The defendant filed a special plea in bar admitting plaintiff's appointment on the police force at the salary specified in the declaration, and also his faithful performance of the duties required of him, in that position, for the time for which he

claimed pay; but setting up, by way of avoidance, that he ought not to recover, because, at the time of his appointment, he had never served in the army or navy of the United States, which service, it was alleged, was, and is, a condition precedent to legal appointment on the police force.

To this plea the plaintiff filed a demurrer which set up (1) that the statute relied upon in the plea had been repealed, and that there was no such statute in force in the District of Columbia; and (2) that the appointment of the plaintiff on the police force, and the acceptance of his services, as such officer, by the defendant, entitled him to recover for such services.

The demurrer was certified to the Supreme Court of the District in general term, to be heard there in the first instance, and, having been overruled, judgment was entered in favor of the plaintiff for the full amount sued for. The opinion of the court below, in advance of the official reports, will be found in vol. 19, Washington Law Reporter, 386. The District has prosecuted a writ of error.

The single question in the case is, whether § 354 of the Revised Statutes of the United States relating to the District of Columbia, prescribing the qualifications of persons eligible for appointment on the police force, was repealed by the act of June 11, 1878, 20 Stat. 102, c. 180.

To understand fully the nature of this question a brief summary of the legislation of Congress respecting the government of the District of Columbia, and especially with regard to the District police, since 1861, will be found useful, if not indispensable. By the act of August 6, 1861, 12 Stat. 320, c. 62, the District of Columbia was constituted a "Metropolitan Police District," and the police affairs thereof were put under the control and management of a board of police, consisting of the mayors of Washington and Georgetown and five commissioners of police, to be appointed by the President of the United States, by and with the advice and consent of the Senate. This board was invested with plenary powers respecting the police affairs of the District, in all particulars, and the act established a complete system of police. The eighth section,

among other things, prescribed qualifications for holding any office on the police force by providing therein as follows: "No person shall be so appointed to office, or hold office in the police force aforesaid, who cannot read and write the English language, or who is not a citizen of the United States, or who shall ever have been indicted and convicted of crime."

Shortly after the close of the war, an additional qualification for the benefit of the honorably discharged soldiers and sailors of the United States who had participated in that great struggle, was prescribed for those holding office on the force. The general appropriation act of March 2, 1867, 14 Stat. c. 166, 440, 457, in its first section provided that "hereafter no person shall be appointed as policeman or watchman [in the metropolitan police for the District of Columbia] who has not served in the army or navy of the United States, and received an honorable discharge."

These provisions respecting the qualifications of an officer on the police force were carried into the Revised Statutes of the United States relating to the District of Columbia, enacted at the first session of the 43d Congress, and are there embodied in § 354. That section provides as follows: "No person shall be appointed to office, or hold office in the police force, who cannot read and write the English language, or who is not a citizen of the United States, or who shall ever have been indicted and convicted of crime; and no person shall be appointed as policeman or watchman who has not served in the Army or Navy of the United States and received an honorable discharge."

During all this period, and up till 1878, the police affairs of the District remained under the control of the metropolitan police board established by the act of 1861. In the meantime, however, the other governmental affairs of the District had undergone several changes. By the act of February 21, 1871, 16 Stat. 419, c. 62, a territorial government was established for the District, the general administration of affairs being committed to a governor and a legislative assembly. This territorial system of government, however, did not last long. The act establishing it was repealed in 1874, and the repealing

act vested the affairs of the District in a commission, consisting of three persons to be appointed by the President of the United States by and with the advice and consent of the senate. This commission was invested with large and ample powers for the administration of the general affairs of the District, but had no power or authority in matters relating to the schools or to the police. With respect, however, to the appointment and removal from office of persons employed in other capacities, and those officers themselves, it provided, in § 2, as follows: "Said commissioners are hereby authorized to abolish any office, to consolidate two or more offices, reduce the number of employés, remove from office, and make appointments to any office authorized by law." Act of June 20, 1874, 18 Stat. 116, c. 337.

Affairs remained thus until 1878. On the 11th of June of that year an act was passed entitled "An act providing a permanent form of government for the District of Columbia." 20 Stat. 102, c. 180. This act continued in force the main provisions of the act of 1874, enlarged the power and authority of the commissioners in some respects, especially with regard to the schools and the police, and retained the provision respecting officers, above quoted, from the act of 1874. Its sixth section is as follows: "That from and after the first day of July, 1878, the board of metropolitan police and the board of school trustees shall be abolished; and all the powers and duties now exercised by them shall be transferred to the said commissioners of the District of Columbia, who shall have authority to employ such officers and agents and to adopt such provisions as may be necessary to carry into execution the powers and duties devolved upon them by this act. . . ."

The court below held that the section just quoted had the effect of repealing § 354 of the Revised Statutes relating to the District, prescribing certain qualifications for officers and members of the police force, and gave to the commissioners full power and authority to appoint to such offices whoever they might choose, under such regulations as they might adopt.

Mr. Assistant Attorney General Maury for plaintiff in error.

The result of the decision of the court below is that the act of June 11, 1878, 20 Stat. 102, c. 180, has repealed section 354 of the Revised Statutes relating to the District of Columbia. So that, under this view, a person "who cannot read and write the English language," or who has been "indicted and convicted of crime," or "who has not served in the army or navy of the United States and received an honorable discharge," may be appointed to any position in the metropolitan police. In a word, the decision is that Congress has legislated so unwisely as to do away with all law prescribing the qualifications of members of the police force, and leave the matter to the commissioners, unreservedly.

The act of 1878, which is supposed to have produced this effect, contains no words of repeal, but the court below held that there was a necessary implication in the act of an intention to repeal section 354.

If the act of 1878 had prescribed what the qualifications for appointments to the police force should be, the intention to supplant section 354 would have been clear; but the act is silent on the subject. Upon what ground of construction can we say that the old law requiring that a policeman shall have certain qualifications is impliedly repealed by the subsequent law? There is no inconsistency between the full power over appointments and removals in the police force given to the District commissioners and the previous law requiring that a policeman should read and write English, be a citizen of the United States, should not have been convicted of crime, and should have served in the army or navy and been honorably discharged therefrom.

If section 354 is repealed, then is also section 357, forbidding a member of the police force to receive, under any pretence whatever, "any present, fee or emolument for police services other than the regular salary and pay provided by this chapter, except by consent of the board of police;" and the same may be said of section 351, requiring that the members of the police force shall be required to take an oath of office, and other sections which need not be particularly mentioned.

That Congress had no intention whatever of repealing sec-

tion 354 is conclusively shown by section 4 of the act of January 31, 1883, 22 Stat. 412, c. 41, which is in the following words: "That the commissioners may, and they are hereby, authorized to appoint not more than six privates, to be members of the police force, from among citizens of the United States who have or have not served in the Army and Navy of the United States, but who shall possess all the other qualifications prescribed by section three hundred and fifty-four of the Revised Statutes of the United States relating to the District of Columbia."

This section is not referred to in the opinion of the learned judge of the court below. Had it been brought to the attention of the court it would, we conceive, have compelled a judgment in support of the plea. Congress, it thus appears, clearly recognized section 354 as a part of the subsisting law regulating the police force of the District as much as seven years before the so-called appointment of the defendant in error, Hutton.

Nothing is more improbable than that Congress should have harbored the purpose to deprive the police force of the District of the great advantage of being recruited from men honorably discharged from the army and navy, bringing as they do into the force the tone of the regular military service. It is a mistake to suppose that this requirement was intended to be temporary.

The case of *Eckloff* v. *District of Columbia*, 135 U. S. 240, does not conflict with our theory, because it holds that in the matter of appointments and removals from the police force the act of 1878 had superseded and repealed the previous law, which is undoubtedly correct.

But it is to be remembered that it was "the powers and duties" of the police board only that were transferred to the commissioners by section 6 of the act of 1878. Now these "powers and duties" did not extend to the subject of the qualifications of members of the police force, nor can it be said that the existence of section 354, prescribing such qualifications, is, in any just sense, an interference with or a restriction upon the appointing power of the commissioners, or is in any

way incompatible with the act of 1878. Nobody doubts that Congress may prescribe qualifications for office without at all invading the power of appointment of the President, let alone the commissioners of the District.

The appointment of Hutton being in violation of law, the District of Columbia cannot be compelled to make compensation for services rendered by him under that appointment.

Mr. Andrew B. Duvall for defendant in error.

Mr. Justice Lamar, after stating the case, delivered the opinion of the court.

The question of the repealing effect of the act of 1878 was before us in *Eckloff* v. *District of Columbia*, 135 U. S. 240. In that case the question was, whether that statute had repealed § 355 of the Revised Statutes relating to the District of Columbia, which provided that no person should be removed from the police force except upon written charges preferred against him to the board of police, and after an opportunity should have been afforded him of being heard in his defence. The court decided that the repeal had been effected, and that the District commissioners, under the power conferred upon them by those sections of the act of 1878 to which we have referred, might summarily dismiss and remove a member or officer from the police force.

In its opinion, the court considered the effect of the merging, as it were, by the act of 1878, of the powers and duties formerly belonging to the metropolitan police board with those plenary powers over the other affairs of the District which had been vested in the commissioners by the act of 1874, and held that the commissioners, under the act of 1878, had the same unlimited and plenary power respecting the appointment and removal of police officers, as they had had under the act of 1874, and continued to have under the act of 1878, over the other affairs of the District.

The court, however, did not rest its decision and judgment upon that point alone, but went into a consideration of the

general object and purpose of the act of 1878, with respect to the government of the District, and said:

"But our conclusions are not controlled by this construction alone. The court below placed its decision on what we conceive to be the true significance of the act of 1878. As said by that court, it is to be regarded as an organic act, intended to dispose of the whole question of a government for this District. It is, as it were, a constitution for the District. It is declared by its title to be an act to provide 'a permanent form of government for the District.' The word permanent is suggestive. It implies that prior systems had been temporary and provisional. As permanent it is complete in itself. It is the system of government. The powers which are conferred are organic powers. We look to the act itself for their extent and limitations. It is not one act in a series of legislation, and to be made to fit into the provisions of the prior legislation, but is a single complete act, the outcome of previous experiments, and the final judgment of Congress as to the system of government which should obtain. It is the constitution of the District, and its grants of power are to be taken as new and independent grants, and expressing in themselves both their extent and limitations. Such was the view taken by the court below; and such we believe is the true view to be taken of the statute." 135 U. S. 243, 244.

Under this view of the object and purposes of the act of 1878, we think the court below was correct in holding that that act superseded and repealed by implication § 354 of the Revised Statutes relating to the District of Columbia. It is true there are no express words of repeal in the act of 1878 applied to said § 354. But the whole tenor of the act shows that it was intended to supersede previous laws relating to the same subject matter, and to provide a system of government for the District complete in itself, in all respects. The language of the sixth section of the act of 1878, that the commissioners "shall have authority to employ *such officers and agents*, and to adopt such provisions as may be necessary to carry into execution the powers and duties devolved upon them by this act," clearly implies, we think, that, in the

employment of officers over whom they are given control, they may select such persons, under appropriate regulations, as they may deem suitable and competent for the discharge of the duties pertaining to such offices, without regard to their possessing the qualifications prescribed by said § 354.

Moreover, we think, the reasons actuating Congress in 1867 and in the 43d Congress, for requiring that a member of the District police should be an honorably discharged soldier or sailor, did not exist, at least in the same degree, in 1878. When this qualificational provision was first enacted, the war had not been long ended, and it was but in harmony with the general liberal policy of the government of the United States towards those who had fought in its army and navy during that conflict, that a discrimination should be made in their favor, in the matter of appointments to various places of trust in the nation's capital. Their appointment on the police force would serve also to imbue that force with at least some of the precision and attention to duty found in all well regulated military companies that have seen actual service. But in 1878, the war had been over a number of years, and those who had participated in its struggles were growing old, and were becoming less able physically to perform all the duties of a member of the police force. Under those conditions, it is entirely consistent with the policy of Congress to hold that they intended to abolish the qualificational standard orginating in the act of 1867. That standard of qualification was for the benefit, as we have said, of those who had served in the war; and to carry it along indefinitely would make it apply to those who had enlisted and been discharged in time of peace, as well as to those for whose benefit it was originally intended. As was said by the court below, "it is not likely that Congress intended to discriminate between the citizen and the soldier or sailor of a peace establishment."

We are not unmindful of the rule that repeals by implication are not favored. But there is another rule of construction equally sound and well settled which we think applies to this case. Stated in the language of this court in *United States* v. *Tynen*, 11 Wall. 88, 92, it is this: "When there are two acts

on the same subject the rule is to give effect to both if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act." See also *Murdock* v. *Memphis*, 20 Wall. 590, 617; *Tracy* v. *Tuffly*, 134 U. S. 206, 223; *Fisk* v. *Henarie*, 142 U. S. 459.

It is contended, however, that by the act of January 31, 1883, (22 Stat. 412, c. 41; Sup. to Rev. Stat. 2d edition, 397,) Congress recognized said § 354 as a still subsisting law, and that that consideration should compel a reversal of the judgment below. We are not impressed with this contention. The object of the act just referred to was to abolish the detective force established by § 340 of the Revised Statutes relating to the District of Columbia, and to increase the police force in certain respects. The fourth section, which is the one relied on as sustaining the view contended for, is as follows:

"That the commissioners may, and they are hereby, authorized to appoint not more than six privates, to be members of the police force, from among citizens of the United States, who have or have not served in the army and navy of the United States, but who shall possess all the other qualifications prescribed by section three hundred and fifty-four of the Revised Statutes of the United States relating to the District of Columbia."

It is manifest, however, from an inspection of this section that there was no recognition in it by Congress that said § 354 was still subsisting law. But even if Congress had supposed that that section was still the law, when, as a matter of fact, it had been repealed, it would make no difference in this consideration. *Postmaster General* v. *Early*, 12 Wheat. 136, 148; *Town of South Ottawa* v. *Perkins*, 94 U. S. 260, 270; *United States* v. *Claflin*, 97 U. S. 546, 548. The question is, *was said* § 354 *repealed by the act of* 1878? That is a judicial question, to be determined by the courts, upon a proper construction of that section and subsequent legislation upon the same subject

matter, and is not for the legislative branch of the government to determine. *Authorities last cited.* The act of January 31, 1883, did not profess to reënact the provisions of § 354, and we do not think there is anything in that act running counter to the view we have taken in this case of the repeal of that section by the act of 1878.

It is further argued that if said § 354 be considered repealed by the act of 1878, then certain other named sections of the Revised Statutes relating to the District of Columbia must also be held to be repealed, and that certain evil consequences will flow from such ruling with respect to those specified sections. That, however, is a consideration not properly involved in this case. Whether those specified sections or any others of said Revised Statutes were repealed by the act of 1878 we do not now decide. Our decision and judgment has reference solely to section 354. It will be time enough to consider other questions when they are properly before us.

Judgment affirmed.

NATIONAL STEAMSHIP COMPANY *v.* TUGMAN.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

No. 150. Argued January 11, 1892. — Decided February 1, 1892.

In a case reversed in this court and remanded to a state court upon the ground that that court had lost its jurisdiction by petition and bond for removal, the propriety of staying proceedings in the Circuit Court after removal, until costs adjudged in the state court are paid, is purely a matter of discretion in the Circuit Court.

On the trial of an action to recover from a carrier freights improperly collected from the consignees on shipments by plaintiff, plaintiff, who was his own witness, was asked several questions with the apparent design of showing that he had had other transactions with the defendant, upon which he was indebted to defendant, and that there was a judgment pending against him in favor of defendant. *Held*, that these questions were not admissible.

It being shown that a paper was served as a copy of an affidavit on behalf of the defendant, with an order to show cause in the action on trial, it is

thereby sufficiently authenticated to enable it to be read in evidence against him, and it is competent evidence on behalf of the plaintiff as an admission by the defendant that the facts stated in the affidavit are true.

THE case is stated in the opinion.

Mr. John Chetwood for plaintiff in error.

Mr. Delos McCurdy for defendant in error.

MR. JUSTICE BROWN delivered the opinion of the court.

This was an action at law originally begun in the Supreme Court of the State of New York, Kings County, by the plaintiff Tugman, to recover of the National Steamship Company, defendant, for the conversion of freights alleged to have been wrongfully and fraudulently collected from the consignees of certain cargoes shipped by the plaintiff upon the defendant's vessels. Upon entering its appearance the defendant filed a petition and bond for the removal of the action to the Circuit Court of the United States for the Eastern District of New York, upon the ground of the citizenship of the plaintiff and its own alienage. The removal was denied by the state court, the case tried and judgment rendered in favor of the plaintiff, which was affirmed by the General Term, and again by the Court of Appeals. A writ of error was thereupon sued out from this court, and the case reversed with $108.34 costs, upon the ground that the state court lost its jurisdiction by the petition and bond for removal. The case was remanded to the state court with direction to accept the bond and "proceed no further in the cause." 106 U. S. 118.

On filing the mandate of this court in the Supreme Court of New York, the defendant steamship company had its costs taxed at $1206.33, including an extra allowance of $500 ordered by the court, and a judgment was entered in that court for this sum. A transcript having been filed in the Circuit Court of the United States, and the case coming on for trial, the defendant moved for a stay of proceedings until its costs were paid, and the court ordered a stay until the payment of the costs, $108.34, in this court only. 30 Fed. Rep. 802. Defendant

declined to receive this amount, whereupon the stay was vacated, the case went to trial, and plaintiff recovered a verdict and judgment under the direction of the court for $7549.59. To reverse this judgment the defendant sued out a writ of error from this court.

(1) The first assignment of error of the steamship company is to the refusal of the court to stay proceedings on the part of the plaintiff until the payment of the costs in the state courts, as taxed. We do not deem it necessary to express an opinion whether, in view of our mandate to accept the bond for removal and proceed no further in the case, the state court had jurisdiction to enter up a judgment for costs against the plaintiff in that court, since the propriety of staying proceedings until payment of these costs, whether evidenced by a judgment or by a simple taxation, was purely a matter of discretion in the court below. There were certain reasons why, in the exercise of a sound discretion, that court might refuse such stay. The plaintiff had obtained a judgment in the state court which had been affirmed by the General Term and the Court of Appeals. Such judgment, it is true, had been reversed by this court, not by reason of any want of merits, however, but for the failure of that court to recognize a removal of the cause to the Circuit Court of the United States. Under such circumstances, and in view of the apparent inability of the plaintiff to pay these costs, it was perfectly competent for the court to permit him to go on with the case upon the assumption that, if he succeeded in obtaining a judgment, the right, if it had any, of defendant to such costs could be secured by deducting them from such judgment. The result of the trial having been again adverse to the defendant, it certainly has no right to complain of that which could work it no possible injury.

(2) Upon the examination of the plaintiff, who was his own witness, he was asked several questions with the apparent design of showing that he had had transactions with the defendant in New York, upon which he was indebted to it, and that there was a judgment pending against him in favor of the defendant. This was clearly immaterial. The fact that he

was indebted to the defendant in other transactions had no tendency to show that he had not a valid claim against it in this one. If offered for the purpose of showing a conspiracy between plaintiff and defendant's agent, Carhart, to defraud the defendant, it is sufficient to say that this would constitute an independent defence, and one which was not set up in the answer, and was not admissible under a general denial.

Nor were the answers to these questions admissible to show his interest in the suit, since, being himself the plaintiff, that was already clearly manifest.

(3) There was no error in admitting the affidavit of Hurst. It seems that on the trial in the state court before a referee an order was obtained by the defendant upon the plaintiff to show cause why the answer should not be amended by setting up a conspiracy between plaintiff and defendant's agent; that the affidavit of Hurst was made in support of this order; and that a copy of said order was served upon plaintiff with the copy of this affidavit, which was the copy offered in evidence. Its admissibility being objected to upon the ground that it had not been properly proved, the plaintiff called as his own witness Mr. Chetwood, the attorney for defendant, who testified that he was unable to produce the original of the affidavit because it was upon the files of the state court; that he thought the copy was in the handwriting of a clerk who was in the office at the time; and that he presumed that the paper offered in evidence was the copy served on the other side with the order to show cause. His testimony was also corroborated by that of his managing clerk, who also swore that it was in the handwriting of one of the clerks in the office, and that he had no doubt it was a copy of the affidavit which was served with the order to show cause. The fact that the paper offered in evidence was served as a copy of the affidavit with the order to show cause in this same suit was sufficient evidence of its authenticity to enable it to be read against the defendant, who made use of it to obtain the order. *Insurance Co.* v. *Newton*, 22 Wall. 32; *Richelieu Nav. Co.* v. *Boston Ins. Co.*, 136 U. S. 408.

The affidavit which was made by the sole managing agent

of the defendant company, stated that "the ocean rate having risen, defendants collected the excess on the other side and refused to account for it in any way to plaintiff, with whom they supposed they had no contract and to whom they supposed they were under no liability." Having been made in this same suit, and having been used by the defendant to obtain the order for leave to amend its answer, it was competent evidence in behalf of the plaintiff as an admission by the defendant that the facts stated in it were true. Having affirmed that it was credible when used for one purpose defendant will not be permitted to repudiate it when offered for another purpose.

Various other exceptions were taken to the admission of testimony, but we find no error in respect to any of them. The instruction of the court to find in favor of the plaintiff was clearly correct, and the judgment will be

Affirmed.

SIOUX CITY AND IOWA FALLS TOWN LOT AND LAND COMPANY *v.* GRIFFEY.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 157. Argued January 15, 18, 1892. — Decided February 1, 1892.

The grant of public land to the State of Iowa by the act of May 15, 1856, 11 Stat. 9, c. 28, "in alternate sections to aid in the construction of certain railroads in that State" was a grant *in præsenti*, which did not attach until the time of the filing of the map of definite location; although the beneficiary company (under the Iowa statute) may have surveyed and staked out upon the ground a line for its road before the filing.

The plaintiff, claiming under the said grant to the State of Iowa, brought an action against the defendant to recover a tract, a part of the grant. The defendant claimed under a patent from the United States subsequent to the filing of the map of definite location, but issued on a preëmption claim made prior thereto, and filed a cross bill for quieting his title. *Held*, that it was not open to the plaintiff to contest the *bona fides* of the preëmption settlement.

THE court stated the case as follows:

Statement of the Case.

On May 15, 1856, Congress passed an act granting lands to the State of Iowa to aid in the construction of certain railroads. 11 Stat. 9, c. 28. The grant was a grant *in præsenti*, and of alternate sections, with the familiar provision: "But in case it shall appear that the United States have, when the lines or routes of said roads are definitely fixed, sold any sections, or any parts thereof, granted as aforesaid, or that the right of preëmption has attached to the same, then it shall be lawful for any agent or agents, to be appointed by the governor of said State, to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tiers of sections above specified, so much land, in alternate sections, or parts of sections, as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the rights of preëmption have attached as aforesaid."

By an act of the general assembly of Iowa, of date July 14, 1856, the Dubuque and Pacific Railway Company was made one of the beneficiaries of this grant. By section 6 it was provided: "The lines and routes of the several roads above described shall be definitely fixed and located on or before the first day of April next after the passage of this act, and maps or plats showing such lines or routes shall be filed in the office of the governor of the State of Iowa and also in the office of the secretary of the State of Iowa. It shall be the duty of the governor, after affixing his official signature, to file such map in the department having the control of the public lands in Washington, such location to be considered final only so far as to fix the limits and boundary in which said lands may be selected." The map of the definite location thus provided for was not received by the officers of the State until after September 27, 1856, and was filed at the General Land Office in Washington on October 13, 1856. Prior, however, to the 14th day of July, and the passage of the act making it the beneficiary of the Congressional grant, the Dubuque and Pacific Railroad Company had commenced the survey of its line, and had surveyed and staked out a line upon the surface of the ground along the land in controversy, which by such survey was within the limits of the grant. On the 19th of

July, 1856, Griffey entered upon this land, filed his declaratory statement, and on the 5th of September located it with a military bounty land warrant, and received his certificate of location.

Mr. W. C. Goudy for plaintiff in error.

The patent to Griffey was void. There was no authority in the officers of the United States to issue or grant the same. If the former grant to the railroad company was unlawful the only way in which that question could be presented and decided was by a resort to the courts. There was no authority in the executive officers of the government to determine the respective rights of the parties claiming title to the land. The fact that a patent was issued and granted to Griffey is not evidence that it was rightfully issued. And if no further testimony is presented except the acts of Congress, the patents and deeds, a court would be compelled to decide in favor of the elder patent. If this proposition is correct, then the rights of the parties in this litigation must be determined upon the facts presented in evidence without any aid from the patent issued to Griffey. *Ryan* v. *Carter*, 93 U. S. 78; *Whitney* v. *Morrow*, 112 U. S. 693; *Langdeau* v. *Hanes*, 21 Wall. 521; *Moore* v. *Robbins*, 96 U. S. 530; *United States* v. *Stone*, 2 Wall. 525; *Hughes* v. *United States*, 4 Wall. 232; *United States* v. *Bell Tel. Co.*, 128 U. S. 315; *United States* v. *Schurz*, 102 U. S. 378; *Bicknell* v. *Comstock*, 113 U. S. 151.

But it is claimed that the issue of the patent to Griffey in 1882 was authorized by an act of Congress of April 21, 1876. 19 Stat. 35, c. 72. The first section of that act is as follows: "Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, that all preëmption and homestead entries, or entries in compliance with any law of the United States, of the public lands, made in good faith by actual settlers, upon tracts of land of not more than one hundred and sixty acres each, within the limits of any land grant, prior to the time when notice of the withdrawal of the lands embraced in such grant was received at the local land office of the district in which such lands are situated, or after

their restoration to market by order of the General Land Office, and where the preëmption and homestead laws have been complied with, and proper proofs thereof have been made by the parties holding such tracts or parcels, they shall be confirmed, and patents for the same shall issue to the parties entitled thereto."

Even if the acts of Griffey came within the language of this act of Congress, it would not be effectual for divesting the title of the elder grantee. It is not in the power of a legislative body to take the title from one person and invest it in another. *Terrett* v. *Taylor*, 9 Cranch, 43.

The alleged preëmption was under the act of 1841. This court has held that the object of that act was to enable actual settlers by residence, who should enter upon the lands in good faith to make it a permanent home, to acquire a prior right to make entry thereof. *Bohall* v. *Dilla*, 114 U. S. 47; *Atherton* v. *Fowler*, 96 U. S. 513.

It is claimed that Griffey entered on the land on the 19th day of July, 1856, and erected a dwelling-house thereon; that he moved into the house on the first or second day of September, 1856, and remained there with his family for three days, when he left the premises and returned to his residence in Sioux City. The testimony of Griffey himself, which was the only evidence offered on the point in this case, shows that he lived with his wife and one or more children in Sioux City; that he had a trading post about two miles south of Sioux City; that he kept a saloon, and also had a license to practice law. In the year 1857, he removed to the west of the Missouri River and never afterwards lived east of that river. It is very clear that he did not comply with the preëmption law.

It follows that the defendants are not entitled to relief in a court of equity, and the decree confirming their title and declaring the title of the plaintiff to be null and void, was erroneous. It is not necessary in this court to cite authorities to sustain the proposition that a party must come into a court of equity with clean hands, and that he must show himself entitled, according to the rules of such a court, to the relief demanded.

If the quarter section of land in controversy was in the United States, and no right of preëmption had attached to the same, it will be conceded that the plaintiff had a good title to it. The question for consideration is, when did the grant vest the title in the State?

The first section of the act of May 15, 1856, granted to the State of Iowa, for the purpose of aiding in the construction of certain railroads mentioned therein, every alternate section of land designated by odd numbers for six sections in width on each side of each of said roads. It is very clear, as has been frequently held, that this is a grant *in præsenti*. There is no condition annexed to it. The act does not require in terms the location of the railroad, nor the filing of any plat showing the route, in any office whatever. The grant is complete and unconditional, subject to the previously acquired rights of purchasers or preëmption settlers.

This court held in *Hastings & Dakota Railroad Co.* v. *Whitney*, 132 U. S. 357, that so long as a homestead entry valid upon its face *remains upon the record* the legality of which has been passed upon by land officers, and their action remains unreversed, it is such an appropriation of the tract as segregates it from the public domain and prevents it from passing by a grant by Congress.[1] It therefore becomes important to inquire whether the facts proven bring this case within the rule laid down in that case. We maintain that the evidence does not show that a right of preëmption had attached to the land in controversy. In discussing this we assume that the grant did not attach to the particular quarter section until the line was located.

The plaintiff's evidence shows the time at which the line of the road was located definitely, the different stations from Dubuque to Sioux City. The map shows that the line of road was located to Independence, Iowa, between July and November 6, 1855; from Independence west to a point near Webster City, between May 30 and June 22, 1856; between Webster City and Fort Dodge, between June 22 and 27, 1856; from Fort Dodge, to a point on section 29, township 88, range 29, between June 27 and June 30, 1856. The map then shows the survey

commenced at Sioux City on the 5th day of July, 1856, and to have been located between that point and the station in section 29, township 88, range 29, between that date and the 5th of August, 1856. It appears, from the map as well as from the testimony, that the line from Sioux City eastward and by the tract of land in controversy was located by the engineer on the 5th day of July, 1856. The road was actually constructed on the route so located, and there has never been any change therefrom.

The Secretary of the Interior, by a letter dated the 4th of February, 1857, asked the opinion of the attorney general as to the construction of the land grant act. The attorney general, by letter of the 16th of February, 1857, gave it as his opinion "that by surveying and marking the lines on the ground those lines are definitely fixed" so as "to give to the State an equitable or inchoate title to the dependent lands, equal in right, at least, to that which any preëmptor gains by commencing actual settlement." This view was adopted by the government. Following it the commissioner vacated and cancelled the alleged entry and preëmption of Griffey. This came to Griffey's knowledge in the month in which it was made, and he took no appeal. The law was thus settled as far as it could be by the executive officers, and there was no decision of any court to the contrary.

It is most earnestly insisted that the construction given to the act of Congress by the executive officers of the government at that time was the correct one.

Several decisions of this court are relied upon to establish the proposition that the title could not pass from the United States and vest in the State of Iowa until the 13th of October, 1856, when the map or plat showing the route was lodged in the General Land Office.

An examination of these opinions will show that in the cases before the court there was an express provision requiring the filing of the map, to make the definite location of the line of route, or that it was made the duty of the government officer to withdraw the lands from market upon filing such a map.

It is sufficient to say that whatever the rule laid down by

these cases, decided since 1865, even if it applies directly to the case now before the court, it will not be allowed to disturb the rules of law established, prior to that time, and according to which the title to the lands had passed from the United States. This would be more than retroactive legislation. It would be the establishment of rules by decisions of court, contrary to the rule of *stare decisis*, and having retroactive effect so as to divest title to land, and change the rules of property.

Mr. S. S. Burdett (with whom was *Mr. O. C. Treadway* on the brief) for defendants in error.

Mr. Justice Brewer delivered the opinion of the court.

The first and principal question is at what time the title of the railroad company attached, whether at the time the map of definite location was filed in the General Land Office at Washington, or when, prior thereto, its line was surveyed and staked out on the surface of the ground. While the question in this precise form has never been before this court, yet the question as to the time at which the title attaches, under grants similar to this, has been often presented, and the uniform ruling has been that it attaches at the time of the filing of the map of definite location. *Grinnell* v. *Railroad Co.*, 103 U. S. 739; *Van Wyck* v. *Knevals*, 106 U. S. 360, 366; *Kansas Pacific Railway Co.* v *Dunmeyer*, 113 U. S. 629, 634; *Walden* v. *Knevals*, 114 U. S. 373; *United States* v. *Missouri, Kansas &c. Railway*, 141 U. S. 358, 375.

In *Van Wyck* v. *Knevals*, where the question arose between Knevals, the grantee of the railroad company, and Van Wyck, who had entered the lands at the local land office after the filing of the map of definite location with the Land Department, but before notice thereof had been received at such local land office, this court said: "The route must be considered as 'definitely fixed' when it has ceased to be the subject of change at the volition of the company. Until the map is filed with the Secretary of the Interior the company is at

liberty to adopt such a route as it may deem best, after an examination of the ground has disclosed the feasibility and advantages of different lines. But when a route is adopted by the company, and a map designating it is filed with the Secretary of the Interior and accepted by that officer, the route is established; it is, in the language of the act, 'definitely fixed,' and cannot be the subject of future change, so as to affect the grant, except upon legislative consent." And in *Pacific Railway Company* v. *Dunmeyer*, it is also said: "We are of opinion, that under this grant, as under many other grants containing the same words, or words to the same purport, the act which fixes the time of definite location is the act of filing the map or plat of this line in the office of the Commissioner of the General Land Office. The necessity of having certainty in the act fixing this time is obvious. Up to that time the right of the company to no definite section, or part of section, is fixed. Until then many rights to the land along which the road finally runs may attach, which will be paramount to that of the company building the road. After this no such rights can attach, because the right of the company becomes by that act vested. It is important, therefore, that this act fixing these rights shall be one which is open to inspection. At the same time it is an act to be done by the company. The company makes its own preliminary and final surveys by its own officers. It selects for itself the precise line on which the road is to be built, and it is by law bound to report its action by filing its map with the commissioner, or rather in his office. The line is then fixed. The company cannot alter it so as to affect the rights of any other party."

The reasoning of these opinions is applicable here. The fact that the company has surveyed and staked a line upon the ground does not conclude it. It may survey and stake many, and finally determine the line upon which it will build by a comparison of the cost and advantages of each; and only when by filing its map it has communicated to the government knowledge of its selected line, is it concluded by its action. Then, so far as the purposes of the land grant are concerned, is its line definitely fixed; and it cannot thereafter,

without the consent of the government, change that line so as to affect titles accruing thereunder. In accordance with these decisions it must, therefore, be held, that the line was not definitely fixed until the 13th of October, 1856.

Inasmuch as Griffey's preëmption right had attached to this land prior to such time, it did not pass to the railroad company under the grant; and it was a matter of no moment to the company what thereafter became of the title. This is settled by the case of *Pacific Railway Company* v. *Dunmeyer*, in which it was said: "It is not conceivable that Congress intended to place these parties as contestants for the land, with the right in each to require proof from the other of complete performance of its obligation. Least of all is it to be supposed that it was intended to raise up, in antagonism to all the actual settlers on the soil, whom it had invited to its occupation, this great corporation, with an interest to defeat their claims, and to come between them and the government as to the performance of their obligations." And, again: "Of all the words in the English language, this word *attached* was probably the best that could have been used. It did not mean mere settlement, residence or cultivation of the land, but it meant a proceeding in the proper land office, by which the inchoate right to the land was initiated. It meant that by such a proceeding a right of homestead had fastened to that land, which could ripen into a perfect title by future residence and cultivation. With the performance of these conditions the company had nothing to do. The right of the homestead having attached to the land it was excepted out of the grant as much as if in a deed it had been excluded from the conveyance by metes and bounds." See also *Hastings & Dakota Railroad* v. *Whitney*, 132 U. S. 357, in which was a similar ruling.

The only other question we deem important is this: On July 5, 1871, the State of Iowa issued a patent, under which plaintiff in error claims, and on June 30, 1882, the United States issued a patent to Griffey, which is the basis of defendants' title. The defendants filed, as was authorized under the Iowa statute, a cross-petition, praying to quiet their title,

and the decree entered was one dismissing the plaintiff's bill and quieting defendants' title.

Now, it is claimed that Griffey never complied with the preëmption laws; that he never made a *bona fide* settlement; that he secured his preëmption rights by false representations and a pretended settlement; that he does not come into a court of equity with clean hands, and is entitled to no relief; and that, therefore, there was error in entering a decree in favor of the defendants upon the cross-petition. But as we have seen, Griffey did make a settlement, file his declaratory statement and thus initiate a preëmption right. By these means such preëmption right had, in the language of the statute, attached. The land, therefore, did not pass under the railroad grant. It was no matter of interest to the company what became of the title. The government, the owner of the land, was satisfied with what Griffey had done, took from him its land warrant as payment, and patented the land. Into the *bona fides* of this transaction, no one but the government can inquire. As the title was beyond challenge on the part of the railroad company, it had no right to cast a cloud thereupon, and having done so by accepting a patent from the State of Iowa, under the pretence that the land was a part of the grant made to that State, and having affirmed the validity of the title conveyed by such patent, it does not lie in its mouth, or with those claiming under it, to now object to a decree removing all cloud cast by such patent.

We see no error in the rulings of the Supreme Court of Iowa, and its judgment is

Affirmed.

Statement of the Case.

NEW ORLEANS PACIFIC RAILWAY COMPANY *v.* PARKER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF LOUISIANA.

No. 137. Argued January 4, 5, 1892. — Decided February 1, 1892.

When several plaintiffs claim under the same title, and the determination of the cause necessarily involves the validity of that title, and the whole amount involved exceeds $5000, this court has jurisdiction as to all such plaintiffs, though the individual claims of none of them exceed $5000: but where the matters in dispute are separate and distinct, and are joined in one suit for convenience or economy, the rule is the reverse as to claims not exceeding $5000.

A mortgage by a railroad company of its railroad, rights of way, road-bed and all its real estate then owned or which might be thereafter acquired appurtenant to or necessary for the operation of the railroad, and all other property wherever situated in the State, then owned or which might thereafter be acquired by the company, and which should be appurtenant to or necessary or used for the operation of its road, and also the tenements, hereditaments and appurtenances thereunto belonging, does not cover a grant of lands within the State subsequently made by Congress to the company in aid of the construction of its road.

An appurtenance is that which belongs to or is connected with something else to which it is subordinate or less worthy, and with which it passes as an incident; and in strict legal sense land can never be appurtenant to land.

A grant to a railroad company of public lands, within defined limits, not sold, reserved or otherwise disposed of when the route of the road becomes definitely fixed, conveys no title to any particular land until the location, and until the specific parcels have been selected by the grantee and approved by the Secretary of the Interior.

If a holder of one or more of a series of bonds issued by a railroad company and secured by a mortgage in terms like this mortgage has a right to institute proceedings for the foreclosure of the mortgage, (about which no opinion is expressed,) he is bound to act for all standing in a similar position, and not only to permit other bondholders to intervene, but to see that their rights are protected in the final decree.

THE court stated the case as follows:

This was a bill in equity to foreclose a mortgage, and a cross-bill to have the mortgage decreed not to be a lien upon

the land grant involved in the controversy. The bill was originally filed February 15, 1886, by the plaintiff Parker, "for himself and for all parties holding bonds and coupons similar to those herein set forth," against the New Orleans, Baton Rouge and Vicksburg Railroad Company, (hereinafter called the Baton Rouge Company,) the Union Trust Company of New York, the New Orleans Pacific Railway Company, (hereinafter called the Pacific Company,) John F. Dillon and Henry M. Alexander, trustees in certain land-grant mortgages of the Pacific Company, and Samuel D. McEnery, then governor of Louisiana, to foreclose a mortgage given by the Baton Rouge Company, October 1, 1870, upon the property of the company and upon a land grant claimed to be covered by such mortgage. Plaintiff Parker claimed only the amount of coupons matured upon two bonds. Subsequently one Hamlin, another bondholder under the same mortgage, intervened in the cause, which was tried in the Circuit Court, and two distinct decrees rendered upon the same day; one in favor of Parker in the sum of $2400, with interest at five per cent from October 1, 1885, and one in favor of Hamlin for $6000 with like interest. 33 Fed. Rep. 693. The mortgage in question, so far as it is material to be considered, purported to cover the right of way, . . . "also all other property, real and personal, of every kind and description whatsoever and wherever situated in the State of Louisiana, which is now owned or which shall hereafter be acquired by the said company, and which shall be appurtenant to or necessary or used for the operation of said main line of railroad or any of said branches," etc. The mortgage, which was made to the Union Trust Company of New York, provided that the holders of bonds and coupons should have the right to institute legal proceedings for its foreclosure. The company put the bonds, secured by this mortgage, upon the market, and disposed of a number of them. This mortgage was by public act and was recorded in several of the parishes through which the main line and the branches were to run.

By an act of Congress approved March 3, 1871, 16 Stat. 573, c. 122, to incorporate the Texas Pacific Railroad Company, certain lands in Louisiana were granted to the Baton Rouge

Company in aid of its construction of a railroad from New Orleans to Baton Rouge, thence by way of Alexandria to the eastern terminus of the Texas Pacific Railroad at Shreveport.

On November 11, 1871, the Baton Rouge Company filed in the General Land Office a map designating the general route of its road from Baton Rouge, by way of Alexandria, to Shreveport, and thereupon the withdrawal of the public lands along this line was ordered, in accordance with the provisions of the above act of Congress, secs. 12 and 22. In 1881 the Baton Rouge Company transferred all its right, title and interest in these lands to the Pacific Company, and in March, 1885, patents were issued to said company, as assignee of the Baton Rouge Company, for 679,287 acres of land lying in different parts of the State.

At the time this assignment was made no work either upon the main line or upon the branches had been done by the Baton Rouge Company. December 28, 1870, the Baton Rouge Company executed a second mortgage to the governor of the State, as trustee, to secure the payment of certain bonds which were never issued. Such second mortgage having been subsequently cancelled, on September 4, 1872, one Allen, assuming to act as president of the Baton Rouge Company, also executed a mortgage to secure the payment of 12,000 bonds, which, however, appear never to have been issued.

By acts of mortgage dated April 17, 1883, and January 5, 1884, the Pacific Company executed to appellants Dillon and Alexander a land grant and sinking fund mortgage upon the lands acquired from the Baton Rouge Company, to secure the payment of certain bonds, which the bill averred to be subsequent and subordinate to the mortgage executed by the Baton Rouge Company to secure the payment of the bonds in suit.

None of the defendants named in the bill appeared except the Pacific Company and Dillon and Alexander, trustees of the land grant mortgage of this company. These parties filed a general demurrer, which was argued and overruled, in September, 1886, and a decree *pro confesso* was entered against the other defendants. Subsequently an answer was filed, alleging in substance that the charter of the Baton Rouge Company

Counsel for Appellants.

did not authorize a mortgage on the land grant or on future property; that the mortgage did not embrace the land grant; that the Baton Rouge Company made no definite location of its road, nor built any portion of the same; that the Pacific Company purchased from the Baton Rouge Company, as alleged in the bill, and thereupon constructed its road; and that the legal title to the land grant remained in the United States until patents were issued to this company. October 13, 1886, these defendants filed a cross-bill setting forth that the cross-complainants were endeavoring to sell the lands that had been patented to them, and were being embarrassed and prevented by reason of the claim set up by Parker in his bill; that as the mortgage sought to be foreclosed, and the outstanding bonds secured thereby did not mature for several years, they would continue to be embarrassed for a long time; that Parker had sued on behalf of himself and of other holders of bonds issued under the mortgage of 1870, and, as complainants were advised and believed, represented upwards of two hundred of said bonds, each holder of which might bring suit and involve them in a multiplicity of suits; and that only a court of equity could afford relief by removing this mortgage as a cloud upon the title of the Pacific Company to the lands; and prayed for a decree adjudging that the mortgage did not embrace the land grant in question. Parker subsequently filed a demurrer to this cross-bill. On December 24, 1886, Hamlin intervened by petition, and was admitted as a co-plaintiff in the cause. Subsequently the case was heard and separate decrees rendered in favor of Parker and Hamlin for the amounts of their several claims, adjudging the mortgage to be a valid lien upon the lands, which were ordered to be sold, and dismissing the cross-bill. Appellants took an appeal from these decrees to this court. Parker thereupon moved for a dismissal of the appeal as to him upon the ground that less than $5000 was involved. The consideration of this motion was postponed to the merits.

Mr. William Wirt Howe and *Mr. John F. Dillon* for appellants. *Mr. Wager Swayne* was with them on the brief.

Argument for Appellee.

Mr. A. H. Garland for appellees (*Mr. A. H. Leonard* was on the brief as of counsel for appellee Parker).

I. The equitable jurisdiction of the Federal courts attaches in Louisiana just as it does in other States, and causes in equity instituted in Louisiana in such courts must be determined by the rules and principles of equity.

It is the general rule of the common law that future property cannot be mortgaged, but the rule of the civil law is different. "Those who bind themselves by any engagement whatever may, for the security of their performance of the engagement on their part, appropriate and mortgage not only the estate they are masters of at the time of contracting, but likewise all the estate which they shall be afterwards seized or possessed of." 1 Domat, Cushing's ed. 649, Art. 5. With reference to the sale or mortgage of future property, equity has adopted the principles of the civil law. *Mitchell* v. *Winslow*, 2 Story, 630; *Willink* v. *Morris Canal Co.*, 3 Green Ch. (3 N. J. Eq.) 377; *Pierce* v. *Emery*, 32 N. H. 484. In *Pennock* v. *Coe*, 23 How. 117, this court held that a railroad company, authorized to borrow money and issue their bonds to enable themselves to finish and stock the road, may mortgage not only the then acquired property, but such as may be acquired in future. The law of Louisiana is in accord with the law of her sister States, and of all civilized countries, with regard to mortgages of future property by railroad companies. It is true that Article 3308, Civil Code, declares, "Future property can never be the subject of conventional mortgage," but in *Bell* v. *Chicago, St. Louis &c. Railroad*, 34 La. Ann. 785, it was held that this article applies "only to individuals in their ordinary transactions. It has no reference to juridical persons," governed in this respect by other laws.

II. What meaning and what effect shall be given to the words of the mortgage? Are the lands granted by Congress to the New Orleans, Baton Rouge and Vicksburg Railroad Company covered by the mortgage given by that company to secure payment of its first mortgage construction bonds?

The question as to what property is covered by a mortgage

is purely one of construction, and depends entirely upon the language used and the obvious intention of the parties, to be gathered therefrom, and the authority under which it was issued.

Obviously in determining such a question very little assistance can be had from adjudged cases. Each case must necessarily be determined by its own peculiar circumstances; but it must be borne in mind that under the laws of Louisiana in a *doubtful* case, the agreement is interpreted *against him who has contracted the obligation.* Civil Code, Art. 1957, as amended by Act No. 87 of General Assembly, session of 1871, page 201, Art. 1957, which declares: "In a doubtful case the agreement is interpreted against him who has contracted the obligation."

From the facts and circumstances shown by the record, it is impossible to avoid the conclusion that when the incorporators applied for a charter, and when the legislature granted a charter to the railroad company, both the incorporators and the legislature expected the road and branches to be constructed with moneys derived *exclusively* from the sale of the bonds of the company; that the incorporators desired and intended the legislature should invest the company with power to mortgage its *franchises* and *all its future property*, without exception; that the legislature intended to invest the company with such power, and, in fine, that the main object of both the corporators and the legislature was to make the bonds of the company attractive to capitalists.

The company intended to mortgage and did mortgage *all* of its property within the State of Louisiana of every nature and description whatsoever and *wherever* situated, then owned, or which might thereafter be acquired, together with all its franchises, rights and privileges. A multitude of words was used *ex industria* to convey that intention simply because the draughtsman who framed the act of the legislature incorporating the company was not skilled in the use of words.

The words used in the mortgage were of course intended to mean something. In construing a contract some meaning must be given, when it can properly be done, to all words

found therein. The mortgagor intended to mortgage all property necessarily used for the operation of the line; all property which, though not necessary, was nevertheless used for its operation; and all property appurtenant to the line or any of its branches.

The lands were granted by Congress to aid in the construction of the branch line. They were appurtenant to that line, and could not be diverted from it without fraud. "The words of a law — and of a contract — are generally to be understood in their usual signification, without attending so much to the niceties of grammatical rules as to the general and popular use of the words." Civ. Code. La. Art. 14. This rule is common to all systems of jurisprudence. The word "appurtenant" is thus defined: Webster — Belonging to; Latin, *appertinere*; from *ad* — to — and *pertinere* — to belong to, to pertain to. Bouvier — Belonging to, pertaining to. These definitions undoubtedly give "the usual signification" of the word — the sense in which it is generally and popularly used.

When appurtenant was used by the legislature of Louisiana in the act of incorporation, and when that word was used in the mortgage, it was used in its usual, general and popular signification. In the civil law that word has no technical meaning. It may have in the common law, but the legislature of Louisiana and the mortgagors, citizens of Louisiana, authorizing and executing a mortgage in Louisiana to have effect only in Louisiana, did not use the word "appurtenant" in any sense in which it may be technical in the common law — they used it to express its *general signification* in the "popular use" of the word. By the use of the words "appurtenant to the line" they meant to convey, and did convey, the idea that all property, real and personal, of whatever description and wheresoever situated, belonging to or pertaining to the line, was to be subject to the mortgage given to secure the payment of the bonds.

Bouvier, after giving the technical meaning of "appurtenant" in the common law, says: "The thing appurtenant must be of an inferior nature to the thing to which it is appurtenant; thus a right of common may be appurtenant, as when

it is annexed to lands in other lordships." Even in this sense the lands granted to aid in the construction of a railroad are appurtenant thereto, the road being the principal thing to which such lands pertain, to which they belong.

The real difference between the opposing parties in the case at bar is this. We say the mortgage in question expressly embraces all property of every kind and description whatsoever and wheresoever situated, then owned, or which might be acquired by the New Orleans, Baton Rouge and Vicksburg Railroad Company, appurtenant to its main line or any of its branches, and we say further that such mortgage was a mortgage of the whole road as a whole thing, with all its corporate franchises and rights, carrying with them all subsequently acquired property.

Our adversaries say the mortgage covers so far as after acquired property is concerned only such as is appurtenant to the *operation* of the line. This idea is always in the mind of our learned opponents. They persistently express it. Nearly all of the cases cited by them in their brief filed in court *a qua* show simply that property not connected with the *operation* of a road is not embraced within the terms of a mortgage granted on property *used* for *operating* a road. This and nothing more was decided in following cases cited on their brief. *Walsh* v. *Barton*, 24 Ohio St. 28; *Farmers' Loan & Trust Co.* v. *Commercial Bank*, 11 Wisconsin, 215; *S. C.* 15 Wisconsin, 424; *S. C.* 82 Am. Dec. 689; *Seymour* v. *Canandaigua & Niagara Falls Railroad*, 25 Barb. 284; *Dinsmore* v. *Racine & Miss. Railroad*, 12 Wisconsin, 725; *Farmers' Loan & Trust Co.* v. *Cary*, 13 Wisconsin, 110. These decisions are sound, but they decide nothing applicable to the case at bar.

A careful study of all the authorities bearing on this case confirms the opinion that the essential question in this case is one purely of interpretation and construction. It depends upon the language used and the intention of the parties, which must be gathered from the act of mortgage and the circumstances attending its execution.

The language used in the mortgage under consideration and the circumstances attending its execution show conclusively that the New Orleans, Baton Rouge and Vicksburg Railroad

Company intended to mortgage and did mortgage all its real estate then owned or which might thereafter be acquired of every kind and description whatsoever and wheresoever situated. The mortgage, then, by its terms, covers the lands granted by Congress to that company "in aid of the construction of the road." Moreover, it is clear that said company by said mortgage mortgaged its road and all branches as a whole thing, together with all its corporate franchises and privileges. If so, future acquired property became subject to the mortgage as an accession to the thing mortgaged.

Under the general law of Louisiana, and under the charter granted to the New Orleans, Baton Rouge and Vicksburg Railroad Company that company was expressly authorized to mortgage its property, and also its corporate franchises, and it did mortgage all its property and also its corporate franchises. Such a mortgage is a mortgage of the corporation as an entirety. It includes all property owned by the corporation and all property subsequently acquired.

Mr. Justice Brown delivered the opinion of the court.

(1) The motion of the plaintiff Parker, to dismiss the appeal as to him upon the ground that less than five thousand dollars is involved, demands our first consideration. His position is that the suit embraces two separate and distinct controversies: one between Parker and appellants, and one between Hamlin and appellants; that there were separate decrees in these several causes; that these decrees cannot be aggregated for the purpose of sustaining the jurisdiction of this court, nor can the appeal be sustained as to him by reason of the fact that, as to Hamlin, more than the requisite jurisdictional amount is at issue. It is true that the amount of Parker's decree was but twenty-four hundred dollars and interest, but his bill was filed not only for himself, but for all the other bondholders under the mortgage, and the cross-bill avers that he actually represented upwards of two hundred of the bonds issued under this mortgage, (an averment admitted by his demurrer,) and prayed for a decree declaring the invalidity of the entire mortgage as to these

lands. Had the bill been filed by the trustee under this mortgage for the foreclosure of the whole amount of the debt, and a similar cross-bill had been filed for its cancellation, there could be no doubt of the appealable character of any decree rendered upon these pleadings. This mortgage, however, contained a provision permitting a foreclosure by any holder of an overdue bond or coupon. Parker's bill was filed practically for the benefit of the entire number of bondholders, and the cross-bill could not be sustained except upon the theory that the entire mortgage was invalid as a lien upon these lands. While a decree in favor of the cross-plaintiff might not have been binding upon any defendant to the cross-bill who did not appear, it certainly would have been binding upon Hamlin as well as Parker, since Hamlin, on being made a plaintiff, expressly stipulated that the cause should be considered as if he had been one of the original plaintiffs; that Parker's pleadings should be considered as his; and that the pleadings of the defendants should apply equally to him. If Parker's argument in this connection be sound, it would necessarily follow that if every bondholder of this mortgage had intervened, and a cross-bill had been filed against them all, praying a cancellation of the entire mortgage, our jurisdiction to review a dismissal of this bill could not be sustained as to any of such bondholders whose decrees were not more than five thousand dollars, notwithstanding it would be sustained as to others whose decrees were larger. The result would be that the land might be sold for the benefit of the larger bondholders, and freed from the lien of the smaller.

Where several plaintiffs claim under the same title, and the determination of the cause necessarily involves the validity of that title, this court has jurisdiction as to all such plaintiffs, though the individual claims of none of them exceed five thousand dollars. Thus in *Shields* v. *Thomas*, 17 How. 3, 4, where a bill was filed by several distributees of an estate, to compel the payment of money alleged to be due them, and a decree was rendered in their favor, it was held that this court had jurisdiction over an appeal, although the amount payable to each individual was less than two thousand dollars. It was

held that the matter in controversy was the amount due the representatives of the deceased collectively; and not the particular sum to which each was entitled, when the amount was distributed among them. Said the court: "They all claimed under one and the same title. They had a common and undivided interest in the claim; and it was perfectly immaterial to the appellant how it was to be shared among them." The case of *Rodd* v. *Heartt*, 17 Wall. 354, is still more nearly analogous. In this case, which was in admiralty, a fund exceeding the jurisdictional amount paid into the registry of the court was claimed on the one hand by several creditors secured by one mortgage, and on the other by a number of mariners and material men. A decree having been made adverse to the mortgagees, an appeal was taken by them to this court, and it was held that although no one of the claims under the mortgage equalled the jurisdictional amount, yet as the claim of the appellants, which was disallowed, exceeded that sum, an appeal would lie. In *The Connemara*, 103 U. S. 754, it was held that where salvors united in a claim for a single salvage service, jointly rendered by them, the owner of the property was entitled to an appeal where the sum decreed exceeded $5000, though in the division among the several parties sharing in the recovery several were awarded less than $5000. In line with these cases are those of *Davies* v. *Corbin*, 112 U. S. 36, and *Handley* v. *Stutz*, 137 U. S. 366.

The true distinction is between cases in which there are several plaintiffs interested collectively under a common title, and those wherein the matters in dispute are separate and distinct, and are joined in one suit for convenience or economy. Of the latter class are those relied upon by the plaintiff Parker in this case, and his motion to dismiss must, therefore, be denied. Indeed the cross-bill to set aside the whole mortgage as to these lands is sufficient of itself to remove all difficulty with regard to our jurisdiction.

(2) The case upon the merits depends upon the question whether the mortgage of 1870 should be construed to cover a land grant made by Congress the following year to the Baton Rouge Company, in aid of the construction of its road. To

answer this question satisfactorily it is necessary to consider the power of this company under its charter, and the manner in which it attempted to exercise this power.

The act of 1869 of the legislature of Louisiana, incorporating the Baton Rouge Company, authorized it (sec. 13) to obtain from any parish or other municipality any rights, privileges or franchises that such municipality might choose to grant in reference to the construction of the road: and by section 14, it was authorized to borrow money or to purchase property for the purpose of constructing the road, to issue its corporate bonds, and, to secure the payment of such bonds, to mortgage its road, etc. By section 15, provision was made for a second mortgage guaranteed by the State, and for bonds to be issued and made payable to the State or bearer. By section 16, the first mortgage that should be given was declared to be a prior lien upon the railroad within the State, including all the "real and personal estate within the State of Louisiana, appurtenant to, or necessary for the operation of said main line of railroad, owned by the company at the date of said mortgage, or which may be acquired by it thereafter; and upon the corporate franchises and privileges of said company, granted by the State of Louisiana, relative to the construction, operation and use of said main line of railroad within the State of Louisiana," etc. The mortgage did not differ materially from this act, though its description of property covered by it is still more explicit, and is as follows: "About five hundred and one miles of railroad within the said State of Louisiana, together with the right of way, road-bed, rails, depots, stations, shops, buildings, machinery, tools, engines, cars, tenders and other rolling stock; also all the real and personal estate within the State of Louisiana owned by the said company at the date of this mortgage, or which may be acquired by it thereafter, appurtenant to, or necessary for the operation of said main line of said railroad or any of said branches connected with the said main line, or to be connected therewith; also all other property, real and personal, of every kind and description whatsoever and wherever situated in the State of Louisiana which is now owned or which shall hereafter be acquired by the said company, and

which shall be appurtenant to or necessary or used for the operation of said main line of railroad, or of any of said branches; also the tenements, hereditaments and appurtenances thereunto belonging, and all of the estate, right, title and interest, legal and equitable, of the said company and its successors and assigns therein, together with the corporate franchises and privileges of said company at any time granted or to be granted by the State of Louisiana relative to the construction, operation and use of said railroad within said State." The bonds issued under this mortgage contained a similar description of the property, the latter clause of such description, however, purporting to include "the corporate franchises and privileges of said company granted by the State of Louisiana *or by act of Congress*, relative to the construction," etc. How these words, "or by act of Congress," came to be inserted in the bonds does not appear; it may have been an oversight, or the company may have supposed that the land grant would be acquired and that the insertion of these words would impart additional currency to the bonds. It is not material, however, to determine why or how this was done, since neither the act of the legislature nor the mortgage itself assumed in terms to cover anything granted by the act of Congress.

The language of the act of the legislature and of the mortgage itself restricts its lien to real and personal property situated in the State of Louisiana, then owned or which should thereafter be acquired, and which should be appurtenant to, or necessary, or used for the operation of the main line of said road, or any of its branches. The succeeding clause, which includes tenements, hereditaments and appurtenances thereunto belonging, etc., was manifestly not intended as an expansion of the prior clause, and for the purposes of this case may be treated as superfluous. No argument is needed to show that a land grant is not necessary to the operation of a railroad; it may be a necessary aid in the construction of a road, but it is certainly not necessary in its operation. Plaintiff's contention, then, if supportable at all, must be upon the theory that the land grant was appurtenant to the road, not necessa-

rily to its operation, but to the road itself. The word "appurtenant," as ordinarily defined, is that which belongs to or is connected with something else to which it is subordinate or less worthy, and with which it passes as an incident, such as an easement or servitude to land; the tackle, apparel, rigging and furniture to a ship; a right of common to a pasture; or a barn, garden or orchard to a house or messuage. In a strict legal sense it is said that land can never be appurtenant to land, *Jackson* v. *Hathaway*, 15 Johns. 447, 454; *Leonard* v. *White*, 7 Mass. 6; *Woodhull* v. *Rosenthal*, 61 N. Y. 382; but it was evidently contemplated by this mortgage that real as well as personal property subsequently acquired, such as land for stations, machine shops or other purposes immediately connected with the road, should pass under the lien of the mortgage. Property, however, not connected with what is ordinarily termed the plant, or not forming a part of the organic structure of the road, is never treated as appurtenant to it. Thus in *Humphreys* v. *McKissock*, 140 U. S. 304, decided at the last term of this court, it was held that a railroad company joining in the construction of an elevator upon land not belonging to it, and situated at some distance from its road, did not by its ownership of stock in the elevator company acquire such an interest in it as would pass as an appurtenance under the mortgage of the road, as constructed or to be constructed, and the "appurtenances thereunto belonging." The court went further, and held that the elevator itself, if owned by the company, would not be appurtenant to its road. In line with this are the earlier cases of *Harris* v. *Elliott*, 10 Pet. 25, holding that the soil and freehold of a street did not pass as appurtenant to a lot of land fronting upon such street. So in *Linthicum* v. *Ray*, 9 Wall. 241, it was said that the right to use a wharf would not pass as appurtenant to a lot, as it was not in any way connected with the enjoyment or use of the lot, and a right not so connected could not be annexed as an incident to land so as to become appurtenant to it. In *Smith* v. *McCullough*, 104 U. S. 25, a mortgage executed by a railroad company upon its then and thereafter to be acquired property contained a specific description of such property, and was

held not to cover municipal bonds issued to it in building the road, which were not embraced in such description. And in *Bank* v. *Tennessee*, 104 U. S. 493, where a bank was required by its charter to pay a certain tax in lieu of all other taxes, and was authorized to purchase and hold a lot of ground for its use "as a place of business," and hold such real property as might be conveyed to it to secure its debts, it was held that the immunity from taxation extended only to so much of the building as was required by the actual needs of the bank in carrying on its business. See also *Tucker* v. *Ferguson*, 22 Wall. 527.

Analogous cases in the state courts are numerous. Thus in *Parish* v. *Wheeler*, 22 N. Y. 494, it was held that canal boats purchased with the funds of a railroad company, and used and run by it in connection with its railroad, but beyond its terminus, were not covered by a mortgage of its engines, cars, etc., "and all other personal property in any way belonging or appertaining to the railroad of said company." So in *Boston & New York Air Line Railroad* v. *Coffin*, 50 Connecticut, 150, the property mortgaged by the railroad company was described very nearly in the terms employed in the mortgage under consideration, and it was held that lands purchased by the company outside of the lay-out of the road, and not needed for its use or construction, were not covered by the mortgage. It was said in the opinion, that "lands purchased and sold at a profit, although the profit might be expended in the construction of the road, were never intended to be embraced by the phrase, 'acquired by the company for the purposes of the railroad.'" In *Mississippi Valley Co.* v. *Chicago, St. Louis & New Orleans Railroad*, 58 Mississippi, 846, a railroad mortgage covering property thereafter to be acquired was confined to such as was appurtenant to or necessary for building or operating the road, and carrying out the purposes for which it was created, and was held not to include a hotel and brick storehouse, some vacant town lots and a farm of three hundred acres; the hotel being used as a railroad eating-house, and the other property being rented out for the several purposes for which it was adapted. In *Meyer*

v. *Johnston*, 53 Alabama, 237, *S. C.* 64 Alabama, 603, a mortgage of a railroad and "all other property now owned, and which may be hereafter owned by the railroad company," was held not to cover a land grant of the United States made by an act of Congress subsequently passed. Other cases to the same purport are: *Shamokin Valley Railroad Co.* v. *Livermore*, 47 Penn. St. 465; *Dinsmore* v. *Racine &c. Railroad Company*, 12 Wisconsin, 725; *Farmers' Loan &c. Company* v. *Commercial Bank*, 11 Wisconsin, 207; *S. C.* 15 Wisconsin, 424; *Morgan* v. *Donovan*, 58 Alabama, 241; *Walsh* v. *Barton*, 24 Ohio St. 28; *Calhoun* v. *Memphis & Paducah Railroad*, 2 Flippin, 442; *Seymour* v. *Canandaigua & Niagara Falls Railroad*, 25 Barb. 284.

A consideration of the circumstances attending and following the execution of this mortgage strengthens the inference that we have drawn from it, that the land grant was not intended to be included. There is no allegation in the bill that the parties to this mortgage expected, or had any reason to expect that the land grant would be made; and had it been intended to include so important an item, it is scarcely possible that the mortgagor would have left such intention to be inferred from the indefinite and ambiguous language of this instrument. Nor is there any evidence that, after the act of Congress was passed, the line of the road was ever definitely fixed, as contemplated by section 9 of the act of March 3, 1871, 16 Stat. c. 122, 573, 576, although it had filed a map designating the general route of the road pursuant to sections 12 and 22, and obtained an order from the Secretary of the Interior withdrawing from entry and sale the odd-numbered sections of land within the grant and indemnity limits. As the grant was, by section 9, of lands not sold, reserved or otherwise disposed of at the time the route of the road was definitely fixed, it is settled in this court that the title to any particular lands would not pass until the line was so located, because until that time it could not be definitely ascertained what lands had been otherwise disposed of. *Van Wyck* v. *Knevals*, 106 U. S. 360; *Kansas Pacific Railway* v. *Dunmeyer*, 113 U. S. 629; *Sioux City Land Co.* v. *Griffey*, *ante*, 32. As to lands

within the indemnity limits, it has always been held that no title is acquired until the specific parcels have been selected by the grantee, and approved by the Secretary of the Interior. *Grinnell* v. *Railroad Company*, 103 U. S. 739; *Kansas Pacific Railroad* v. *Atchison, Topeka &c. Railroad*, 112 U. S. 414, 421; *St. Paul &c. Railroad* v. *Winona & St. Peter Railroad*, 112 U. S. 720; *Barney* v. *Winona & St. Peter Railroad*, 117 U. S. 228; *United States* v. *Missouri &c. Railway*, 141 U. S. 358, 375; *St. Paul &c. Railroad* v. *Northern Pacific*, 139 U. S. 1. A definite location of this line was subsequently made by the Pacific Company; but there is no evidence that such location coincided with the general route designated by the Baton Rouge Company, and as no patents were ever issued for the lands earned by the construction of the road until March, 1885, when they were issued to the Pacific Company as assignee of the Baton Rouge Company, it is difficult to see what lands were ever "acquired" by the latter company, to which this mortgage would attach.

Not only this, but there is no allegation or evidence that the Baton Rouge Company paid the cost of surveying, selecting and conveying these lands, as required by the act of July 31, 1876, 19 Stat. c. 246, 102, 121, as a preliminary to their conveyance. *New Orleans Pacific Railway* v. *United States*, 124 U. S. 124; *Deseret Salt Co.* v. *Tarpey*, 142 U. S. 241. Nor is there any evidence to show that the Baton Rouge Company ever built any of its line of road or did anything to earn or acquire the title to any part of its land grant.

(3) The decrees in this case were also fatally defective in ordering all the lands assumed to be covered by this mortgage to be sold, free from all liens, mortgages and incumbrances, to satisfy a claim of $2400 in one case and $6000 in another, without making provision for other bondholders, subsequent mortgagees, or other creditors of the road. Assuming for the purposes of this case that, under the peculiar terms of this mortgage, these bondholders had the right to file this bill without calling upon the trustee to act — a point upon which we express no opinion — they had no right to a decree for their exclusive benefit. If a single bondholder has any right

at all to institute proceedings, he is bound to act for all standing in a similar position, and not only to permit other bondholders to intervene, but to see that their rights are protected in the final decree. Upon this principle it was held by this court, in *Pennock* v. *Coe*, 23 How. 117, that a bondholder cannot, by getting a judgment at law, be permitted to sell a portion of the property devoted to the common security, as this would disturb the *pro rata* distribution among the bondholders to which they are equitably entitled. "These bondholders," said Mr. Justice Nelson, "have a common interest in this security, and are all equally entitled to the benefit of it; and in case of a deficiency of the fund to satisfy the whole of the debt, in equity, a distribution is made among the holders *pro rata*. . . . To permit, therefore, one of the bondholders under the second mortgage to proceed at law in the collection of his debt upon execution would not only disturb the *pro rata* distribution in case of a deficiency, and give him an inequitable preference over his associates, but also have the effect to prejudice the superior equity of the bondholders under the first mortgage, which possesses the prior lien." Jones on Railroad Securities, sections 392, 393, 434; *Fish* v. *N. Y. Water-Proof Paper Co.*, 29 N. J. Eq. 16; *Martin* v. *Mobile & Ohio R. R. Co.*, 7 Bush, 116.

In *Railroad Company* v. *Orr*, 18 Wall. 471, 475, a bill was filed by a bondholder, on behalf of himself and all others, against a county and a railroad company for the foreclosure of a mortgage given by the railroad company to secure the redemption of certain bonds issued by the county, and for a sale of the mortgaged property. The railroad company demurred for want of proper parties. It was held that the other bondholders should be parties to the suit, and, in delivering the opinion of the court, Mr. Justice Hunt observed: "It is the interest of every bondholder to diminish the debt of every other bondholder. In so far as he succeeds in doing that, he adds to his own security. Each holder, therefore, should be present, both that he may defend his own claims and that he may attack the other claims should there be just occasion for it. If upon a fair adjustment of the amount of the debts there

should be a deficiency in the security, real or apprehended, every one interested should have notice in advance of the time, place and mode of sale, that he may make timely arrangements to secure a sale of the property at its full value."

In the view we have taken of the case it is unnecessary to consider the other points made by the defence. We are satisfied, both from the words of the mortgage itself, and from the circumstances attending its execution, that it should not be construed to include the land grant subsequently made to this company.

The decrees of the court below must be

Reversed, and the case remanded with instructions to dismiss the bills of Parker and Hamlin, and for further proceedings in conformity with this opinion.

NEW YORK, LAKE ERIE & WESTERN RAILROAD COMPANY *v.* WINTER'S ADMINISTRATOR.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

No. 169. Argued January 19, 20, 1892. — Decided February 1, 1892.

Parol evidence of what is said between a passenger on a railroad and the ticket-seller of the company, at the time of the purchase by the passenger of his ticket, is admissible as going to make up the contract of carriage and forming part of it.

Passengers on railroad trains are not presumed or required to know the rules and regulations of the company, made for the guidance of its conductors and employés, as to its own internal affairs.

Plaintiff bought a ticket in Boston entitling him to a passage over defendant's road. At the time he informed the ticket agent of his wish to stop off at the Olean station, and was then told by the agent that he would have to speak to the conductor about that. Between Binghamton and Olean the plaintiff informed the conductor that he wished to stop over at Olean and the conductor, instead of giving him a stop-over ticket, punched his ticket and told him that was sufficient to give him the right to stop over at Olean, and afterwards to use the punched ticket between Olean and Salamanca. He made the stop, and taking another train to Salamanca, presented the punched ticket, informing the conductor of what had taken

Statement of the Case.

place. The conductor refused to take it and demanded full fare. The payment of this being refused, the conductor stopped the train at the next station and ejected him from it, using such force as was necessary. *Held*,

(1) That he was rightfully on the train at the time of his expulsion;

(2) That the conductor had no right to put him off for not paying his fare;

(3) That the company was liable for the act of the conductor;

(4) That the passenger had a right to refuse to be ejected from the train, and to make a sufficient resistance to being put off to denote that he was being removed against his will by compulsion;

(5) That the fact that under such circumstances he was put off the train was, of itself, a good cause of action against the company, irrespective of any physical injury he might have then received, or which was caused thereby.

When the trial court has, in its general charge, given the substance of instructions requested, there is no error in refusing to give them in the language requested.

It is not the province of this court to determine whether a verdict was excessive.

THE court stated the case as follows:

This was an action by David T. Winter, a citizen of Massachusetts, against the New York, Lake Erie and Western Railroad Company, a New York corporation, to recover damages for having been put off the defendant's train while a passenger thereon between Binghamton and Salamanca, New York. It was commenced in a state court of Massachusetts, and was afterwards, upon the application of the defendant, removed into the proper Federal court, on the grounds of diverse citizenship and of local prejudice and influence. Several other railroad companies that were supposed to have property or funds in their hands belonging to the principal defendant were made parties defendant, as trustees or garnishees.

The declaration contained two counts. In the first it was alleged that on February 13, 1882, the plaintiff, being the owner of an unlimited first-class ticket entitling him to carriage on the defendant's road from Binghamton to Salamanca, took passage on the defendant's train at the former place to be carried to the latter; that between Binghamton and Olean (a station on the road between Binghamton and Salamanca)

the defendant's agent in charge of the train punched his ticket, at his request, so that he was entitled to "stop over" at Olean, and returned it to him; that he did stop over at Olean, and the next day took a train on defendant's road to go to Salamanca, on the aforesaid ticket; that the defendant's agent in charge of the last named train refused to accept his ticket, but demanded payment of a cash fare from Olean to Salamanca, and, upon his refusal to pay the same, forcibly ejected him from the car in which he was riding and removed him from the train, whereby his finger was broken and other severe and painful injuries were sustained; that his luggage and apparel were taken away on the train, and he was thereby deprived of certain valuable papers, and the place where he was ejected from the train was a great distance from any public house; and that it was at a very late hour of the night, and the weather was very cold and inclement; all of which occasioned him great bodily and mental suffering.

The second count alleged that the defendant, by its agents and servants, made an assault upon the plaintiff and ejected him from the cars in which he was lawfully travelling, and did him serious personal injury and subjected him to great personal indignity.

The defendant answered with a general denial, and further alleged that when its conductor applied to the plaintiff for his ticket, after leaving Olean, the plaintiff presented a ticket which had been cancelled to Salamanca, whereupon the conductor told him that such ticket was not good to Salamanca, and that the rule of the road would not allow him to, and he could not, accept it, although it would be good beyond Salamanca, and that he must pay full fare to that point, which the plaintiff refused to do, saying to the conductor to put him off, if he dared to do so; that the conductor told him he should be obliged to stop the train at the next station and put him off; and that, the plaintiff still refusing to pay his fare when the next station was reached, the conductor stopped the train and put him off, using no more force than was necessary and proper.

It was further alleged that the plaintiff had no lawful right

to be transported over the road to Salamanca, and was travelling on defendant's cars in violation of a uniform rule of the road which was explained to him before he was put off, and without any lawful right whatever, and that if he sustained any injuries, of any kind, it was due solely to his own wrong.

The garnishees answered separately, and, with the exception of the Fitchburg road, each averred that it had no property or funds whatever in its hands belonging to the principal defendant. The latter company, in its answer, admitted having several thousand dollars in money belonging to the principal defendant.

Upon the issues thus made up the case went to trial in the state court resulting in a verdict in favor of the plaintiff for over $6000, which, upon motion of the defendant, was set aside by the court. Soon afterwards, the cause was removed into the Federal court, as before stated. Upon a trial in that court, the jury returned a verdict in favor of the plaintiff and against the defendant for $10,000, and judgment having been entered upon the verdict for that amount, this writ of error was sued out. Since the cause was docketed in this court, the plaintiff has died, and his administrator is now representing his estate.

As shown by the bill of exceptions, the plaintiff, on the trial, to sustain the issues on his part, gave evidence to the following effect: On the morning of February 13, 1882, the plaintiff, a resident of Peabody, Massachusetts, purchased an unlimited coupon ticket at the ticket office of the Fitchburg Railroad Company in Boston, from that city to Chicago, one of its coupons being for travel over the defendant's road from Binghamton to Salamanca, New York, at the same time telling the ticket agent that he wanted to buy a ticket which would enable him to stop off at Olean, New York, a town between Binghamton and Salamanca. The agent informed him that such ticket would cost him about $3 more than an unlimited ticket good for one continuous passage over the same route, but it would allow him to stop over at Olean, as he had expressed his desire to do, by "speaking to the conductor."

Plaintiff took the ticket and started on his journey. When

he reached Binghamton three of the lower coupons had been given up, the next one being that for travel between Binghamton and Salamanca. After leaving Hornellsville, a station on the defendant's road between the last-named two places, the plaintiff said to the conductor as he came through the car to take up tickets, that he desired to stop off at Olean, at the same time asking him if they would make connection at that point with a train running south on another road to a town called Portville, where he wished to go for a short time on business. The conductor replied to him that that train would wait for them if they were late at Olean, and further said, "I will fix you all right." The conductor punched his ticket and returned it to him. Reaching Olean the plaintiff got off the train, made his journey to Portville, returned to Olean and took passage on the next west-bound train over the defendant's road to complete his journey to Chicago. When the conductor came for his ticket the plaintiff handed the ticket, attached to which was the punched coupon from Binghamton to Salamanca. The conductor looked at it a minute and threw it back to him, remarking that it was "No good," and that he would have to pay his fare from Olean to Salamanca. After some wrangling over the matter, the plaintiff still refusing to pay the extra fare demanded unless the conductor would give him a written receipt therefor, and the conductor refusing to give such receipt, the latter stopped the train at a small station called Allegheny station, about the middle of the night, and, with the assistance of the brakeman and other employés of the road on the train, forcibly ejected the plaintiff from the train, using much more violence and force than was necessary and proper for such purpose, so that the plaintiff was severely injured in his left arm and wrist, from which injury he has suffered great pain and anguish, and for which he has received medical treatment. Upon reaching the platform the plaintiff, seeing that the night was very dark and the weather very cold, offered to pay the extra fare on to Salamanca if the conductor would allow him to reënter the train; but this the conductor refused to let him do, and in doing so used offensive and unseemly language. Part of the plaintiff's

baggage, containing some clothes, was left on the train and was never returned to him.

He spent the night at Allegheny station, and on the following morning hired a carriage and drove back to Olean where he again took a west-bound train on the defendant's road, and presented to the conductor the same ticket and coupon that had been refused the night before by the other conductor, and it was received without any question whatever as to its validity, and he continued on his journey. On cross-examination the plaintiff testified that he did not ask the conductor before reaching Olean for a stop-over check, and that nothing was said about such thing by the conductor; and on being recalled by his own counsel he stated that the agent in Boston said nothing about a stop-over check.

The plaintiff also introduced evidence tending to prove that it was the duty of the conductor, under a custom in relation to railroad matters, to give the plaintiff a stop-over check at Olean, without plaintiff asking for it, after the latter had stated that he desired to stop over at that place; and that the only difference between the form of a limited ticket, which was good only for a continuous passage, and an unlimited one, such as he had bought, giving stop-over privileges, was, that in the limited ticket the agent selling it would punch out the year, month and day it was sold, in the margin of the ticket, and punch each of the coupons with an L, whereas the unlimited ticket would not be punched at all by the agent selling it.

The evidence introduced by the defendant tended to contradict some statements made by the plaintiff with respect to the conversation had with the agent who sold him the ticket, and also as to the occurrences and conversations which took place between him and the conductor, immediately prior to his being put off, and the amount of force used in putting him off; but the main facts in the case, as testified to by the plaintiff, were practically undisputed. The conductor who put him off was called and testified, among other things, that he thought the plaintiff had a limited ticket instead of one unlimited, and so reported to the company; but that that mistake on his part

really made no difference, as the rules of the road forbade his taking the punched coupon at Olean, and required him to do as he had done, although, upon cross-examination, he admitted that he knew the coupon had not been used to Salamanca, because the punch marks in it had been made by the conductor on the train next ahead of his.

The rules and regulations of the road in force when these occurrences took place were introduced in evidence by the defendant, and with respect to stop-over privileges were as testified to by the conductor. It appeared that these regulations were put up in the cars of the company in 1875, but were not supposed to be remaining there in the year 1882; and it was not shown that the plaintiff ever had any knowledge or notice of their existence. The statutes of the State of New York allowing railroad companies organized under the law of that State to make needful rules and regulations relative to the management of their passenger traffic, and also permitting them to put a passenger who refuses to pay his fare off their trains, using no more force than is necessary for such purpose, were also put in evidence.

The conductor of the train which finally carried the plaintiff to Salamanca was not called as a witness, nor was his absence accounted for; but there was evidence of a high official of the road, brought out on cross-examination, that there were other ways of providing for a passenger entitled to a stop-over privilege than by giving him a stop-over check.

All the plaintiff's testimony with respect to the damages he had sustained, and also with respect to his conversation with the agent who sold him his ticket, was admitted, over the objections of the defendant, and exceptions were duly noted thereto.

At the close of the testimony the defendant presented eleven separate prayers for instructions to the jury, but the court declined to give them except so far as they were embodied in the general charge, and the defendant excepted. The plaintiff's counsel then stated that he should not claim to the jury that more force was used in expelling the plaintiff from the train than was necessary to overcome his resistance; and that element was, therefore, eliminated from the case.

Argument for Plaintiff in Error.

There was no question in the case respecting the measure of damages, as the instructions of the court upon that question were not excepted to.

Mr. Calvin P. Sampson and *Mr. Seth J. Thomas* for plaintiff in error.

Whether there is such proof of agency as to warrant admission of the acts and declarations of the agent in evidence is a preliminary question for the court. *United States* v. *Clicquot's Champagne*, 3 Wall. 114. In the case at bar the ruling of the presiding judge, in this respect, was erroneous. Neither an agency nor the authority of an agent can be proved by the testimony of a witness to conversations with the supposed agent out of court. So far as respects the authority of the Fitchburg road to bind this company it does not appear that this company had given it any authority, except to sell tickets over its road with limitations and conditions printed on their face. It is quite different from the case of a sale of tickets by its own agent over its own road. *Lake Shore & Michigan Southern Railway* v. *Pierce*, 47 Michigan, 277; *McClure* v. *Phil. Wilm. & Balt. Railroad*, 34 Maryland, 532; *Burroughs* v. *Norwich & Worcester Railroad*, 100 Mass. 26.

In *Wait* v. *Albany & Susquehanna Railroad*, 5 Lansing, 475, the court stated their opinion that the power in a railroad corporation to make a contract to carry beyond its line is coincident with the power to make contracts for transportation with other carriers, and is confined to the governing officers of the corporation, and that its subordinate agents do not possess that power unless it has been expressly conferred upon them, or has been so exercised as to have become the established course of business. See also *Grover & Baker Co.* v. *Mo. Pac. Railroad*, 70 Missouri, 672; *Phillips* v. *North Carolina Railroad*, 78 North Carolina, 294; *People* v. *Chicago & Alton Railroad*, 55 Illinois, 95.

We submit that substantially this case has been twice decided by this court; first in *Mosher* v. *St. Louis, Iron Mountain &c. Railway Co.*, 127 U. S. 390, and more recently in *Boylan* v. *Hot Springs Railroad*, 132 U. S. 146.

As to the duty of the presiding judge to give the instructions asked, on the subject of damages, although he had already instructed on that subject, not inconsistently with them, we cite: *Mosher* v. *St. Louis, Iron Mountain & Southern Railway Co.*, 127 U. S. 390; *Boylan* v. *Hot Springs Railroad*, 132 U. S. 146; *Townsend* v. *New York Central Railroad*, 56 N. Y. 295; *Shelton* v. *Lake Shore & Michigan Southern Railway*, 29 Ohio St. 214; *Bradshaw* v. *South Boston Railroad*, 135 Mass. 407; *Frederick* v. *Marquette &c. Railroad*, 37 Michigan, 342; *Petrie* v. *Pennsylvania Railroad*, 13 Vroom (42 N. J. L.) 449; *Pennington* v. *Philadelphia, Wilmington & Baltimore Railroad*, 62 Maryland, 95; *Rawitzky* v. *Louisville & Nashville Railroad*, 40 La. Ann. 47; *Louisville & Nashville Railroad* v. *Fleming*, 14 Lea, 128; *Churchill* v. *Chicago & Alton Railroad*, 67 Illinois, 390; *Chicago, Burlington & Quincy Railroad* v. *Griffin*, 68 Illinois, 499; *Baker* v. *Coffin*, 31 Barb. 556.

Mr. Clifford Brigham (with whom was *Mr. Lewis S. Dabney* on the brief) for defendant in error.

Mr. Justice Lamar, after stating the case, delivered the opinion of the court.

There were eleven assignments of error originally, based upon certain exceptions to the rulings of the court during the progress of the trial, but in the brief of counsel for plaintiff in error they have been reduced to eight. As the only one of these exceptions that was properly saved, under our rules, was that relating to the admission of evidence as to what the ticket agent at Boston said to the plaintiff when he purchased his ticket, we would, perhaps, be justified in limiting our consideration to that point. Aside from this informality or defect in the exceptions saved, however, and as the assignments of error all refer either directly or remotely to that point, and thus relate to but one subject, we shall consider them, not separately, but shall, for convenience, treat them together. It is urged that the court erred (1) in allowing the plaintiff to testify as to what was said by the agent in Boston when he bought his ticket; (2) in its instructions to the jury upon this point, and

with respect to the rules and regulations of the road relative to stop-over checks; (3) in not giving certain instructions asked for by the defendant, upon the question of stop-over checks; and (4) in not telling the jury, in effect, that it was their duty under all the evidence in the case, to bring in a verdict for the defendant.

The grounds upon which it is insisted that the evidence referred to was inadmissible are, that the ticket itself and the rules and regulations of the road, with respect to stop-over checks, constitute the contract between the passenger and the road and the only evidence of such contract, and that no representations made by a ticket seller could be received to vary or change the terms of such contract. This contention cannot be sustained, and is opposed to the authorities upon the subject. While it may be admitted, as a general rule, that the contract between the passenger and the railroad company is made up of the ticket which he purchases, and the rules and regulations of the road, yet it does not follow that parol evidence of what was said between the passenger and the ticket seller from whom he purchased his ticket, at the time of such purchase, is inadmissible, as going to make up the contract of carriage and forming a part of it. In the first place, passengers on railroad trains are not presumed to know the rules and regulations which are made for the guidance of the conductors and other employés of railroad companies, as to the internal affairs of the company, nor are they required to know them. *Hufford* v. *Grand Rapids Railroad*, 64 Michigan, 631. In this case there is no evidence, as already stated, that notice or knowledge of the existence of the rules of the defendant company, or what they were, with respect to stop-over privileges, was brought home to the plaintiff at the time he purchased his ticket or at any time thereafter. There was nothing on the face of the ticket to show that a stop-over check was required of the passenger as a condition precedent to his resuming his journey from Olean to Salamanca, after stopping off at the former place. It is shown by the evidence, that Olean was a station at which stop-over privileges were allowed. Under such circumstances, it was entirely proper for the passenger to make

inquiries of the ticket agent and to rely upon what the latter told him with respect to his stopping over at Olean. *Hufford* v. *Grand Rapids Railroad*, *supra*; *Palmer* v. *Railroad*, 3 So. Car. 580; *Burnham* v. *Grand Trunk Railway Co.*, 63 Maine, 298; *Murdock* v. *Boston & Albany Railroad*, 137 Mass. 293; *Arnold* v. *Pennsylvania Railroad*, 115 Penn. St. 135.

Upon this question, and also with respect to the action of the first conductor and the regulations of the road relative to stop-over privileges, the court gave to the jury the following instructions: "That if the plaintiff's testimony was true in regard to what took place between himself and the ticket agent in Boston, and afterwards with the first conductor on the defendant's train, and if the plaintiff, when he bought his ticket in Boston, informed the ticket agent of his wish to stop off at the Olean station, and was then told by the ticket agent that he would have to speak to the conductor about that, and between Binghamton and Olean the plaintiff informed the conductor that he wished to stop over at Olean and the conductor, instead of giving the plaintiff a stop-over ticket, punched the plaintiff's ticket and told him that was sufficient to give him the right to stop over at Olean and afterwards to use the punched ticket between Olean and Salamanca, then, whatever the rules and regulations of the road were, the plaintiff was rightfully a passenger on the train at the time of his expulsion, and the conductor had no right to put him off for not paying his fare, and the company was liable for the act of the conductor; that if, on the other hand, the plaintiff did not notify the conductor of his wish to stop over at Olean and received no such assurance from the conductor or from the ticket agent as he has testified, then the punched ticket gave him no right to ride as a passenger on the train between Olean and Salamanca without paying his fare, and if he refused to pay his fare when demanded the conductor was justified in putting him off, and his offer to pay his fare after the train was stopped was too late, and did not give him the right to ride on the train, and the conductor was justified in expelling him, notwithstanding the offer."

We think these instructions perfectly correct and that, upon

these points, they embodied substantially the whole law of the case. The gravamen of this action is the wrongful conduct of the conductor who ejected the plaintiff from the train. Whether the plaintiff told nothing but the truth with reference to what occurred on the train between him and the conductor before he was put off and at the time he was put off, or whether the jury believed all he testified to with reference to those matters, is not the question to be determined. But, taking the case in this particular most strongly in favor of the defendant, under the evidence submitted, it must be admitted that the action of the conductor was inexcusable. He testified, among other things, (1) that he thought the plaintiff's ticket was a limited one, and so reported it to his company, when, in truth and in fact, it was unlimited; thus showing carelessness and negligence in a most pronounced degree. (2) That he knew, or had good reason for knowing, that the Binghamton-Salamanca coupon had not been used to the latter place, because it had been punched by Conductor Hurty, who had charge of the next preceding train to the one of which he had charge; so that it was impossible for him to believe that the plaintiff was trying to ride on a ticket that had once been used over that part of the road. But he tries to justify his conduct, in this particular, by saying that he would not have been authorized to carry the plaintiff on his train, anyway, without his having a stop-over check procured from the conductor of the train on which he had ridden to Olean. It may be true that the regulations of the road were substantially to that effect; and it may also be admitted that the road had the right to make such regulations, subject, of course, to the reasonable interests, convenience and comfort of the travelling public. But the testimony of a very high official of the road was, that stop-over checks were not absolutely necessary, and that other arrangements might be, and sometimes were, made. And the very fact that the plaintiff afterwards, on the next morning, did travel from Olean to Salamanca on one of the defendant's trains without producing any stop-over check or any other ticket save and except the one which had been refused the night before, demonstrates clearly that the regulations of the

road with respect to stop-over checks were not unbending and inviolable.

Another circumstance, in this connection, is worth noting: The conductor of the train on which the plaintiff rode from Olean to Salamanca was not called as a witness, nor was his absence accounted for. It was not shown that he was not still in the employ of the defendant. If accessible, his testimony would have gone far towards showing the practice of the defendant with respect to stop-over checks; and his not being called by the defendant makes against its theory that the plaintiff had no right to be carried on the train from which he was ejected without having a stop-over check.

Furthermore, if the evidence of the plaintiff was to be believed, (and in this respect the charge of the court below was sufficiently guarded,) he did all that he was required to do before reaching Olean, to entitle him to the privilege of stopping over at that place and resuming his journey the next day. In fact, his course in this respect was in literal conformity with the regulation of the company, which reads thus: "Timely notice of desire to stop over must be given by the passenger to the company." The plaintiff testifies that he told the conductor that he desired to stop off at Olean and take a train south to Portville, and then, upon returning to Olean, resume his journey to the west on another train; and that the conductor told him he would fix him all right. Even under the regulations of the road with reference to stop-over checks, (although not brought to his knowledge,) he had the right to rely upon the statement of the conductor that he would "fix him all right," and had a right to suppose that nothing further was required to be done by him than was done to entitle him to a stop-over privilege. The conductor, after receiving "timely notice from the passenger of his desire to stop over" at Olean and afterwards take another train for the remainder of his journey, (as he had the right to do on an unlimited ticket,) was thereupon bound to furnish the passenger with a stop-over check without the passenger asking him, in so many words, for one. Under the circumstances of the case, as testified to by the plaintiff, the conductor of the first train was derelict in his duty in not

providing the passenger with a stop-over check when the latter stated to him that he desired to stop off at Olean, (as he had the right to do,) if such check was necessary to enable the passenger to complete his journey to Salamanca. If the jury believed the evidence of the plaintiff in this matter, they were justified in finding negligence on the part of the first conductor. And, upon the case as made by the defendant itself, with reference to what took place between the plaintiff and the conductor who ejected him from the train, leaving out of sight the disputed facts in that matter, it is very clear to our minds that the action of that conductor was unwarranted under the law; and that the charge of the court thereon was as favorable to the defendant as it had the right to demand. The authorities above cited abundantly sustain this view. The reason of such rule is to be found in the principle that where a party does all that he is required to do, under the terms of a contract into which he has entered, and is only prevented from reaping the benefit of such contract by the fault or wrongful act of the other party to it, the law gives him a remedy against the other party for such breach of contract.

These observations dispose of the questions raised touching the conversation between the plaintiff and the ticket agent, the rules and regulations of the company in the matter of stop-over checks, the acts of the several conductors in charge of the trains upon which the plaintiff travelled between Binghamton and Salamanca, and the conduct of the plaintiff himself in those transactions. If he was rightfully on the train as a passenger, he had the right to refuse to be ejected from it, and to make a sufficient resistance to being put off to denote that he was being removed by compulsion and against his will; and the fact that, under such circumstances, he was put off the train, was of itself a good cause of action against the company, irrespective of any physical injury he may have received at that time, or which was caused thereby. *English* v. *Delaware & Hudson Canal Co.*, 66 N. Y., 454; *Brown* v. *Memphis & Charleston R. R. Co.*, 7 Fed. Rep. 51; *Philadelphia, Wilmington & Balt. Railroad* v. *Rice*, 64 Maryland, 63.

It follows from what we have said that there was no error in the action of the court in refusing to direct the jury, in effect, to return a verdict in favor of the defendant. Neither was there any error prejudicial to the defendant in any part of the charge, above quoted, which the court gave to the jury upon the questions we have been considering.

With respect to the instructions requested by the defendant upon these points, which the court declined to give, except as embodied in the general charge, very little need be said. They are as follows:

(1) "The regulation of the defendant corporation, that the several conductors of its trains shall require of each passenger a valid ticket or pay the established fare, is a necessary and proper regulation, and if the plaintiff in this case having, as he says, taken defendant's train at Olean for Salamanca, did not, when thereto requested, present to the conductor a valid ticket but only a ticket that had been cancelled, and refused to pay his fare, then the conductor had the lawful right to stop the train at an intermediate station or near to a dwelling house, and put the plaintiff off the train, using only such force as was necessary for that purpose.

(2) "The regulation of the defendant that a passenger who desires to stop over at an intermediate station, and resume his passage by a later train, must, before leaving the first train, require of the conductor a stop-over check, is a reasonable regulation; and since in this case it appears by the plaintiff's own testimony that his ticket from Binghamton to Salamanca was cancelled before he left the train, and he did stop over at Olean, an intermediate place, and resumed his passage the next day and presented no stop-over check, but only the cancelled ticket, and refused to pay his fare when requested, and persisted in that refusal, the conductor had the lawful right to stop the train at the intermediate station, as he did, and put the plaintiff off the train."

What we have said above virtually disposes of these requests. In so far as they are correct, the substance of them had been given by the court in its general charge, and there was no error, therefore, in refusing to give them in the language

requested. *Washington & Georgetown Railroad* v. *McDade*, 135 U. S. 554; *Ætna Life Ins. Co.* v. *Ward*, 140 U. S. 76. In fact, it is much the better practice to refuse to give instructions to the jury, the substance of which has already been stated in the general charge, than to repeat the same charge in different language, although the charge requested may be technically correct as an abstract proposition of law; for a multitude of instructions, all stated in different language and meaning the same thing, tends rather to confuse than to enlighten the minds of the jury.

Whether the verdict was excessive, is not our province to determine on this writ of error. The correction of that error, if there were any, lay with the court below upon a motion for a new trial, the granting or refusal of which is not assignable for error here. As stated by us in *Ætna Life Ins. Co.* v. *Ward:* "It may be that if we were to usurp the functions of the jury and determine the weight to be given to the evidence, we might arrive at a different conclusion. But that is not our province on a writ of error. In such a case we are confined to the consideration of exceptions, taken at the trial, to the admission or rejection of evidence and to the charge of the court and its refusals to charge. We have no concern with questions of fact, or the weight to be given to the evidence which was properly admitted." 140 U. S. 91, citing numerous cases.

It would subserve no useful purpose to go more into detail as to the assignments of error presented. What we have already said virtually disposes of all of them. We think the evidence objected to was properly admitted; that the charge of the court as given was correct, and embodied the entire law of the case; that its refusal to give the instructions requested, under the circumstances, was not error; and that in no other respect, so far as this record discloses, was any error committed to the injury of the railroad company.

Judgment affirmed.

UNITED STATES *v.* WITTEN.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

No. 151. Argued January 8, 1892. — Decided February 1, 1892.

The stealing of distilled spirits from a distillery warehouse by reason of the omission of the internal revenue officers to provide sufficient locks on the doors affords no defence to an action on the distiller's bond to pay the tax due on the spirits before their removal and within three years from the date of entry.

THE case is stated in the opinion.

Mr. Solicitor General for plaintiff in error.

No appearance for defendants in error.

MR. JUSTICE GRAY delivered the opinion of the court.

This was an action brought in May, 1887, on a bond dated January 31, 1884, given to the United States by the defendant Witten as principal, and the other defendants as sureties, in the sum of $261.90, with condition that the principal should pay, or cause to be paid, to the collector of internal revenue for the fourth collection district of Virginia the amount of taxes due and owing on certain distilled spirits (described) "which were deposited during the month ended January 31st, 1884, and entered for deposit in the distillery warehouse No. 3, of A. S. Witten, at Plumb Creek, in the fourth collection district of Virginia, on the 31st of January, 1884, before such spirits shall be removed from such warehouse, and within three years from the date of such entry."

One breach alleged in the declaration, and denied in the plea, was that at the date of the bond Witten had on deposit in his distillery warehouse ninety-three gallons of distilled spirits in two barrels, deposited January 30, 1884, and had failed to pay within three years from the date of entry the taxes due thereon.

Opinion of the Court.

At the trial the deposit of the spirits in the warehouse and the non-payment of the tax were admitted. The defendants offered evidence tending to show that the locks placed on the doors of the warehouse by the revenue officers were at times not such as required by law, and at other times were insufficient and insecure, and the warehouse itself was not a secure building; and that during such times the warehouse was broken open and the spirits stolen.

The district attorney requested the court to instruct the jury that if these facts were proved, yet the United States were entitled to recover the amount of the taxes on these spirits. But the court refused so to instruct the jury, and instructed them that the United States were entitled to recover that amount, "unless the jury shall believe from the evidence that through the negligence and default of the officers of the government the defendant lost a portion of the whiskey deposited in the bonded warehouse, then as to the number of gallons so lost by the default or negligence of the agents of the government the defendants are entitled to a reduction of the government's demand at the rate of ninety cents on the gallon."

The jury returned a verdict for the defendants, and the United States excepted to the refusal to instruct and to the instruction given, and sued out this writ of error.

By section 3271 of the Revised Statutes, it is enacted that every distiller shall provide at his own expense a warehouse to be situated upon and to constitute a part of his distillery premises, and to be used only for the storage of distilled spirits of his own manufacture until the tax thereon shall be paid, and not to open into the distillery or into any other building; and such warehouse, when approved by the commissioner of internal revenue, on report of the collector, is declared to be a bonded warehouse of the United States, and is to be under the direction and control of the collector of the district and in charge of an internal revenue storekeeper. By section 3274, "every distillery warehouse shall be in the joint custody of the storekeeper and the proprietor thereof;" and shall be securely locked, and shall be opened only in the presence of the storekeeper. And by section 3275, no fence or wall more

than five feet high shall be built around the premises of any distillery, and every distiller shall furnish to the collector of the district as many keys of the gates and doors of the warehouse as the collector may require for any revenue officers authorized to inspect the premises, and the distillery shall be kept always accessible to any officer or other person having such a key.

By section 3293 of the Revised Statutes, as amended by the joint resolution of March 28, 1878, No. 16, and by the act of March 1, 1879, c. 125, § 5, the distiller or owner of all spirits removed to the distillery warehouse is required to enter them for deposit in the warehouse, and, at the time of making the entry, to give bond, with sureties satisfactory to the collector of the district, "conditioned that the principal named in said bond shall pay the tax on the spirits as specified in the entry, or cause the same to be paid, before removal from said distillery warehouse, and within three years from the date of said entry." 20 Stat. 249, 336.

The bond sued on is in that form. By the failure of the defendants to pay the taxes on part of the spirits within three years from the date of their entry for deposit, the condition of the bond was forfeited. The stealing of those spirits from the warehouse by reason of the omission of the revenue officers to provide sufficient locks on the doors affords no defence, either to the principal or to the sureties on the bond. Under the requirements of the internal revenue laws, the warehouse was provided by the owner of the distillery, at his own expense and on his premises, and, although declared to be a bonded warehouse of the United States, and required to be under the direction and control of the collector of the district and in charge of a government storekeeper, was in the joint custody of the storekeeper and the owner. The deposit of the spirits in the warehouse was solely for the benefit of the distiller, and to enable him to give bond for the payment of the tax on the spirits, instead of paying the tax at once. The government assumed no responsibility to him for their safekeeping. If he was not satisfied with the security of the warehouse, he had only to take any measure, consistent with the access and

supervision of the revenue officers, to make it more secure, or else to pay the tax and remove the spirits. The only duty which the revenue officers owed in regard to the security of the warehouse and the safekeeping of the spirits therein, was to the government, and not to the defendants; and any negligence of those officers gave the defendants no rights against the government, and afforded them no excuse for not performing their obligation according to its terms. This is too well settled by previous decisions of this court to require more extended discussion. *Hart* v. *United States*, 95 U. S. 316, and cases cited; *Minturn* v. *United States*, 106 U. S. 437.

The jury in this case having been instructed otherwise, the judgment must be

Reversed, and the case remanded with directions to set aside the verdict, and to order a new trial.

In No. 152, a similar case between the same parties, a like judgment was entered.

Mr. Solicitor General for the United States.

No appearance for defendants in error.

TYLER *v.* SAVAGE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

No. 158. Argued January 18, 1892. — Decided February 1, 1892.

A decree in a suit in equity found that T., an individual defendant, and the remaining assets of a corporation defendant, were liable to the plaintiff for the sum of $10,000 paid by him into the treasury of the company, at the instance of T., for a certificate of stock therein, which company was represented to him by T., who was its president, to be in a flourishing condition, when in fact it was insolvent; and distributed $176.24 as the remaining assets of the company, of which $13.24 went to the plaintiff as a credit on his claim for $10,000; and decreed that T. pay to the plaintiff $10,000, subject to a credit of the $13.24. There was no demurrer

to the bill for multifariousness, and no objection taken in the court below for want of equity. The bill set out fraud in T., and that the $10,000 was due to the plaintiff by T. and the company, and required answers to interrogatories, which answers referred to the books of the company for information: *Held*,

(1) To support jurisdiction in equity, there were in the case discovery, account, fraud, misrepresentation and concealment; the objection to the jurisdiction was not taken in the court below; and the case was not one of a plain defect of equity jurisdiction, under § 723 of the Revised Statutes;

(2) The decree was not outside of the case made by the bill, but gave relief agreeable to it, under the prayer for general relief;

(3) The evidence sustained the decree, and the report of a master, finding in favor of the plaintiff the facts on which the decree was based, was not excepted to by T.

THE court stated the case as follows:

This is a suit in equity, brought in the Circuit Court of the United States for the Eastern District of Virginia, by Sarah C. Savage, a citizen of Pennsylvania, who sues for herself "and all others, creditors of the Virginia Oil Company, who will make themselves parties to this suit on the usual terms," against the Virginia Oil Company, a Virginia corporation; John Tyler, president of said company, and in his own right; John W. Otley, C. W. Tanner, Isaac Davenport, Jr., J. H. Montague, C. E. Belvin, late directors in said company, and citizens of Virginia; and Joseph D. Evans and J. F. Crane, citizens of New York.

The bill, which was filed December 11, 1885, so far as it is material to give its contents, set forth that the plaintiff, being anxious to secure a business position for her son, H. C. Savage, was referred by William E. Tanner, of Richmond, Virginia, with whom she had business transactions, to John Tyler, president of the Virginia Oil Company, of which company C. W. Tanner, a son of William E. Tanner, was a member; that through William E. Tanner she opened negotiations with Tyler, and was informed that she could secure for her son a position equivalent to that of assistant secretary in the company, by the investment of $10,000; that she was willing to make that investment in the shape of a loan well secured, but

Tyler declined to take the sum as a loan, and required that she should purchase of the company that amount of its capital stock at its par value; that, to induce her to purchase the stock, Tyler, as president of the company, sent to her the following letter:

"VIRGINIA OIL COMPANY,

"RICHMOND, VA., *April 10th*, 1884.

"Mrs. S. C. Savage.

"MY DEAR MADAM: Your favor of the 9th is rec'd. During the short interview I had with your son I concluded that he could easily undertake the duties that would be required of him in the employ of this company. With regard to the nature of the investment conveyed in the proposition thro' Col. Tanner, I would say that we have no trouble in borrowing all the money necessary for the conduct of the business upon its present basis, but the proposition to you embraced the idea, (which we had been considering,) of permanently enlarging the scope of our business by increasing our capital stock and getting additional office help. You will readily appreciate the difference to a man'f'g business between borrowing money, which may be called for at the pleasure of the lender, and having the same am't in the shape of a permanent investment, so we concluded that whatever arrangement was made in this direction must be upon a stock basis.

"As to the condition of our Co., the capital stock is at present $18,300, with authority from the stockholders to increase it to $30,000. The last dividend that was declared was a 7% semi-annual. The fiscal year ends on the first of June.

"The prospects of our Co. I consider flattering. We have in the past few months decreased our expenses and the outlook for business is better than ever before.

"Our products are sold North, South & West, and the field we are working is so wide that we could without much risk double our business by adding moderately to our capital. Our manufactures pay a large profit and are favorably known throughout the territory we have travelled. As to your chances of selling your stock at par whenever you might wish, I can only say that a gentleman of New York has bought 30

shares at par within the last ten days, but a sale of stock in any m'f'g Co. would depend on its profitableness at the time the sale was made. Should our negotiations result in your son's coming with us, I shall personally try to make his position a pleasant one.

"Very resp'y, JOHN TYLER, *Pres't;*"

that the plaintiff relied upon the statements made in the letter, and had a right to rely on them, as a basis for the investment of her money; and that the important statements made therein were as follows: (1) The then capital stock of the company was $18,300, with authority from the stockholders to increase it to $30,000; (2) the last dividend declared was seven per cent semi-annual, and the current fiscal year would end June 1; (3) the manufactures of the company were paying a large profit, and were favorably known throughout a wide territory, north, south and west; (4) there had been a late decrease of expenses, and the outlook for business was better than ever before; (5) by adding moderately to their capital, they could, without much risk, double their business; and (6) a gentleman of New York had bought thirty shares of the stock at par within the last ten days.

The bill further averred that, with those statements from the president of the company, she concluded that its stock was a safe investment, and consented to take the stock instead of loaning the money, which was her preference, but which the letter assured her would not suit the company; that thereupon, on May 19, 1884, she paid into the treasury of the company $10,000, and received a certificate for one hundred shares of stock, which she still holds; that, in accordance with her understanding with Tyler, her son was given a position at a salary of $800 per annum, and performed the duties assigned to him until the suspension of the office work; that when the 1st of December, 1884, arrived, she was not informed of the declaration of the semi-annual dividend she had been led to expect, and on the 5th of that month she wrote to Tyler a letter of inquiry concerning it; that in reply she received a letter from him, as follows:

Statement of the Case.

"VIRGINIA OIL COMPANY,
"RICHMOND, VA., *Dec. 8th*, 1884.

"Mrs. S. C. Savage.

"DEAR MADAM: Your favor of the 5th is rec'd. Our company have tho't it wise — as many other m'f'g Co.'s who have not a large surplus of capital have also — in view of the depression in business which causes payments to come in very slowly, to omit a semi-annual declaration of dividend.

"You are mistaken in supposing that the general condition of the finances of the country does not affect our business. It has caused R. R'ds to be months behind in their payments, as well as slack in their orders, on whom the business is largely dependent, but in spite of this the business of the last six months shows a profit over and above expenses.

"You will see, therefore, it is in the interest of all the stockholders that we have prudently determined to avoid weakening our treasury by withdrawing a dividend at this season.

"Hoping this explanation will be satisfactory, I remain —

"Very resp'y, JOHN TYLER, *Pres't;*"

that, when the 1st of June, 1885, arrived she received no notice of dividend and some weeks later received a statement of the business of the company for the fiscal year from June 1, 1884, to June 1, 1885, showing a loss of $3602.47 for the year, and a circular, signed by Tyler as president, making suggestions in regard to reducing expenses, and giving reasons for the depression of business, the reduction of expenses to involve the striking from the pay-roll of a son of Tyler, whose salary was $480 a year, and of the plaintiff's son, whose salary was $800; and that she also received from Tyler a letter dated August 4, 1885, stating that the company owed him between $5000 and $6000, borrowed money, and proposing that, if the plaintiff would assume that debt to Tyler, he would resign his position as president and allow her son to remain in the employment of the company.

The bill also alleged that, for some time before 1881, Tyler and Otley, under the firm name of John Tyler & Co., conducted at Richmond a business in oils, railroad grease, etc.,

and with Tanner, Montague, Davenport and Belvin formed a corporation under the laws of Virginia, known as the Virginia Oil Company, with a capital of not less than $15,000 and not more than $300,000, the stock to be divided into shares of the value of $100 each, to pursue the business of refining and wholesale and retail dealing in petroleum oils, the manufacture and sale of illuminating and lubricating oils, and compounds, including animal, mineral and vegetable oils, the right of prospecting and boring for oils, and the privilege of buying and selling on commission or otherwise crude petroleum and other materials used either separately or in combination for illuminating and lubricating purposes, of which company Tyler was named as president and the other five corporators as directors; that certificates of paid-up stock in the company were issued May 21, 1881, to Tyler, Otley and Tanner, respectively, for 50 shares each, and to Davenport, Montague and Belvin, respectively, for one share each, aggregating 153 shares or $15,300; that on November 12, 1881, 30 shares were issued to Evans, making in all 183 shares; that the books show that no money was paid by Tyler and Otley for their shares, but that the $10,000 of their shares and $1647.15 due by John Tyler & Co. to Tyler, making in all $11,647.15, was balanced by the following items, namely: Amount of inventory turned over, $2450.51; merchandise, balances, $267.55, and cash, $46.50; machinery and fixtures, $395.75; amount of stock allowed Tyler and Otley in consideration of good will, formulas, etc., of John Tyler & Co., $8486.84; total, $11,647.15; that Tyler, as president, Otley, as superintendent, and Tanner, as secretary and treasurer, were each paid a salary, believed to be as much as $1500 per annum apiece, and on June 1, 1882, at the end of the first year, dividends of 20 per cent upon the original capital stock and seven per cent on the shares of Evans, were declared and paid, amounting to $3270; that since that date no dividend had been paid, and now the company was admitted to be insolvent; that on April 3, 1884, Otley's stock was surrendered to the company, and he was paid therefor $2500, being at the rate of fifty cents on the dollar, and his duties and salary as superintendent ceased;

that if that purchase of stock, and the original payments of Tyler and Otley for their stock were permitted to stand, the company was insolvent on April 10, 1884, when Tyler represented it to be in a prosperous condition; that Tyler's letter of April 10, 1884, both by its statements and its omissions, was false and deceitful and operated as a fraud upon the plaintiff, and would cause her to lose the money so obtained from her unless the proper relief should be granted to her; that the mode of settlement for their stock adopted by Tyler and Otley was illegal and fraudulent, and ought to be set aside and they be made to pay for their stock in money; that the pretended sale of good will, formulas, etc., by John Tyler & Co. was in fact a purchase by Tyler from himself, which could not be allowed when he was using the assets of the corporation in the transaction; that the price placed upon that intangible property was fictitious and fraudulent; that now, when the corporation was admitted to be insolvent, not one dollar was estimated as the value of such good will and formulas, in the inventory of the assets made by Tyler; that the taking out of the assets of $2500 by Otley on account of his stock was illegal, and he was a debtor for that sum, with interest; and that any dividend paid to directors and stockholders out of the capital stock of the company made such directors and stockholders liable to the creditors of the company for such dividend.

The bill further alleged that the sum of $10,000 having been unlawfully obtained from the plaintiff "by the misrepresentations of the affairs of the said company by John Tyler, its president and duly authorized agent, and the same having gone into the treasury of, and been expended by, the said company, the said sum, with interest thereon from the 1st day of June, 1884, is justly due her by the said Tyler and Virginia Oil Company, and she has a right to require all the proper assets of the company to be gotten in and to have them applied to the liquidation of the debts due her and others;" that, if any money was due to the company for any part of the subscription of Evans to its stock, both Evans and Crane (the assignee of his stock) were debtors to the company therefor; that the com-

pany was insolvent; and that it was necessary that a receiver of its assets should be appointed.

The bill prayed for answers by the defendants to the following interrogatories: "1. What amount of stock has been issued by the Virginia Oil Company, to whom, and when issued? 2. What was the consideration paid for said stock by the several stockholders, and when and how has it been paid? 3. What sums have been paid to the said stockholders as dividends and when were they so paid and by what authority? 4. What sums have been paid to the several defendants who claim to have been officers of the company and by what authority? 5. Whether any stockholder has surrendered his stock to the company; and, if so, when and what was paid him for the same? 6. What was the statement made to the stockholders, at the end of each fiscal year, of the condition of the company and its business, by the president and directors, or any of them? 7. What meetings of the stockholders have been held, and what were their proceedings at such meetings? 8. How was the money paid in by your oratrix for her stock expended by the company? 9. How and when was the capital lost?"

The bill further prayed for an account of the assets and debts of the company; that the assets be realized as quickly as possible and the funds arising therefrom be paid to its creditors; that the plaintiff's claim to be repaid the money she was induced to pay for the stock issued to her, with interest thereon, be established and be made a debt of the company, and payment of the same be decreed to her; that an injunction be granted, restraining the company and its officers and agents from managing or interfering in its affairs; that a receiver be appointed to take charge of its property and effects, and administer them under the direction of the court; and that general relief be granted and all orders made that the nature of the case might require and to the court might seem meet.

On notice, a receiver was appointed, and all the defendants, except Evans and Crane, were served with a subpœna. Otley answered the bill and the interrogatories, and alleged that he

was not liable to the plaintiff. Tyler entered his appearance as president of the company and in his own right. The bill was taken as confessed against Tanner, Montague and Belvin. Tyler answered the bill, admitting that he wrote the letter of April 10, 1884, averring that everything stated therein as facts was then true, admitting also that he wrote the letters of December 8, 1884, and August 4, 1885, averring that their statements were true and made in good faith, answering the interrogatories, and denying his liability to the plaintiff. Tyler did not challenge the equitable jurisdiction of the court, nor demur to the bill for multifariousness.

The plaintiff replied generally to the answers of Otley and Tyler, and the bill was taken as confessed against the corporation and Davenport.

The receiver reported to the court, on April 15, 1886, that he had not been able to sell the machinery of the corporation, but had disposed of the remnant stock of soaps and oils, and had found that the accounts due the company were almost all uncollectible. He made a statement of receipts and expenditures, accompanied by vouchers, showing no money on hand, and asked to be relieved from his receivership.

On May 14, 1886, an order was made that the suit proceed without service on Evans and Crane, confirming the receiver's report, accepting his resignation and discharging him, appointing another receiver in his place, and referring it to a master to inquire and report, on the testimony of witnesses to be taken and returned by him to the court: "1. What amount of capital stock has been issued by the defendant the Virginia Oil Company, to whom and when issued. 2. What was the consideration paid by each holder for the stock issued to him, and when and how paid, and whether full consideration was paid therefor. 3. What sums have been paid to the several stockholders as dividends, and when, and by what authority, were the payments made; and, if by order of the board of directors or of the stockholders, whether the orders were made at lawful meetings at which there was present a proper quorum. 4. What was the true condition of the company when such dividends were declared, and whether they were paid out

of the profits earned or out of capital or money borrowed. 5. Whether any stockholder has surrendered his stock or any part of it to the company; and, if so, when and what was paid him therefor; and what was the condition of the company at the time as to solvency, and whether the said purchase of stock by the company reduced its capital to less than the minimum allowed by the charter. 6. What sums have been paid to the several defendants, or any of them, who have acted as officers of the company, and by what authority; and if by orders of the directors or stockholders, whether at lawfully constituted meetings. 7. An account of the assets and liabilities of the Virginia Oil Company, showing any priorities which exist among the said liabilities. 8. A correct statement of the condition of the affairs of the company on or about the 1st June, 1884, when the plaintiff was induced to subscribe for stock therein, showing whether the said company was solvent and in a prosperous condition as represented in the letter of John Tyler to the plaintiff, dated 10 April, 1884, and filed as Exhibit 'A' with the bill. 9. Any other matter deemed pertinent by the master or required by either party."

The new receiver reported in January, 1887, that in June, 1886, he had sold all the property of the corporation; that the proceeds of the sale amounted to $367.65; and that he had received in cash $123.89 and disbursed the whole thereof, and deposited in the bank to the credit of the court notes for $248.41. The court made an order confirming his report and discharging him.

In July, 1887, the master filed his report as to the nine items of inquiry referred to him. He reported that the shares of capital stock issued by the corporation were, as stated in the bill, 283 in number, including the 100 issued to the plaintiff; that the plaintiff paid for her stock on May 19, 1884, although the certificate issued to her was dated May 31, 1884; that the consideration paid by Tyler and Otley for their stock was the good will of the business of John Tyler & Co., "and a number of valuable recipes and formulas for the manufacture of oils and grease, together with the stock and fixtures of that business," the former valued at $8486.84, and the latter at $1513.16 net;

that the only dividend ever declared by the corporation was made June 1, 1882, of 13 per cent on the capital stock of the company owned by stockholders the first six months of the year, and 7 per cent on that owned by stockholders the last six months of the year; that the corporation was solvent and prosperous when that dividend was declared, and it was paid out of earnings; that no stock was surrendered by Otley to the corporation; that the salaries of Tyler as president, Otley as superintendent, and Tanner as secretary and treasurer, were $100 a month each for the year ending June 1, 1882, and afterwards were $1500 a year each until the business was closed, excepting that Otley's salary ceased on October 16, 1883, when he sold his stock to Tyler; that there was in bank to the credit of the court in the cause, $166.61; and that there were claims against the corporation, which had been presented to the receiver, amounting to $715.83.

As to the inquiry what was the condition of the affairs of the corporation on or about June 1, 1884, and as to whether it was solvent and in a prosperous condition on April 10, 1884, the date of Tyler's letter to the plaintiff, the master reported that, according to a statement made by Tyler, the assets then exceeded the liabilities by $3261.45, but the items of assets in that statement included $5000 for the stock purchased from Otley; that such $5000 ought to be stricken out entirely, or, if the stock was paid for out of the company's money, ought to be reduced to the $2500 actually paid, leaving an excess of assets of $761.45 to represent the whole of the cash paid stock; but that, as Otley's stock was purchased without authority from the corporation, and the purchase never was approved by it, that item of $2500 also ought to be stricken out, and thus Tyler's statement presented the corporation as having lost its entire cash paid stock and being largely in debt besides; that the formulas and recipes purchased for $8486.84 were then and ever since had been without value or at least unsalable; and that, in a word, the corporation was bankrupt.

The master reported further that on May 19, 1884, the day the plaintiff's stock was paid for, there was paid to a bank in Richmond by the company $5900, of which $4900 went to take

up notes of the company, indorsed by Tyler and Tanner, and $1000 to take up a note of Tyler's, secured by stock of the company; that on May 20, 1884, $300 was paid to Tyler by the company for loans made to it by him in the previous part of that month; that on May 18, 1884, the cash receipts and payments were very nearly balanced; that after that date to the close of that month the receipts were about $320, and, according to Tyler's statement, the amount on hand June 1, 1884, was $246.32; and that it was obvious, therefore, that the large payments above mentioned were made from the money received from the plaintiff.

The master with his report returned the depositions he had taken. The plaintiff filed exceptions to the report, but none of the defendants excepted. The case was heard, and on the 20th of February, 1888, a decree was made which stated that "the court, being of opinion that the defendant John Tyler, individually, and the remaining assets of the Virginia Oil Company, are liable to the plaintiff, Sarah C. Savage, for the sum of ten thousand dollars paid by her into the treasury of the company, at the instance of the said John Tyler, on the 19th day of May, 1884, for a certificate of one hundred shares of stock in said company, which said company was represented to her by the said Tyler, its president, to be in a flourishing condition, when, in fact, it was insolvent, doth so decide, and having caused a statement to be made and filed, marked (R. T.), showing how the fund of $176.24 in the Merchants' National Bank of Richmond to the credit of this cause should be distributed, doth adjudge, order and decree that M. F. Pleasants, the clerk of this court, do draw a check upon the said fund to the credit of the court in this cause in the Merchants' National Bank of Richmond, in his own favor, for the sum of $88 in full of his fees and charges in this cause, and a check upon the said fund in favor of W. W. Henry, attorney for Sarah C. Savage, for $50, the amount of cost paid by the plaintiff in this case, and that he do check upon the said fund for the balance thereof, to wit, $33.24, in favor of the said W. W. Henry, attorney for Sarah C. Savage, of which $20 is the docket fee taxed for plaintiff's attorney, and $13.24 shall be a credit on the said

claim of the plaintiff for ten thousand dollars; and the court doth further adjudge, order and decree that the defendant John Tyler do pay to the plaintiff, Sarah C. Savage, ten thousand dollars, with interest thereon, at the rate of six per centum per annum, from the 19th day of May, 1884, till paid, subject to a credit of $13.24 as of this day, and that the plaintiff be at liberty to sue out execution for the same; and the report of the master is confirmed in all other respects."

The court thus distributed a fund of $176.24 [171.24?] in its hands, the proceeds of the property of the corporation, by paying to the clerk $88 for fees, and to the plaintiff's attorney $50 for costs, and $20 as a docket fee, and the remainder, $13.24, as a credit on the claim of the plaintiff for $10,000; and then it ordered the defendant Tyler to pay to the plaintiff $10,000, with interest at six per cent from May 19, 1884, subject to a credit of the $13.24, as of the date of the decree. From this decree, Tyler appealed to this court.

Mr. Assistant Attorney General Maury for appellant.

I. The first question to be considered is that of jurisdiction. The only ground on which the bill can be supported against Tyler is, that it contains averments to the effect that Tyler is indebted to the Virginia Oil Company on account of his stock therein, and that what is thus owing by him is a part of the assets of the company, and that the complainant has an equity to compel payment of the amount thus due, and to subject it to her claim for damages against the company.

The only equity the plaintiff pretended she had against Tyler was to demand that he should be compelled to pay for his stock in the Virginia Oil Company in money, it being averred that what had been claimed to be a payment for the stock was largely fraudulent and fictitious.

This contention, so persistently made, was declared by the master to be untenable in view of the facts established before him, and the decree confirms the master's report over the plaintiff's exceptions on this head.

This action of the court and master, from which there is

no cross appeal by appellee, left the case entirely destitute of equity against Tyler, and the bill should have been dismissed. If parties could give jurisdiction in equity to the United States courts by mere averments unsubstantiated by proof, the constitutional guaranty of trial by jury would be worthless. This court carefully protects that constitutional right from invasion by equity. *Russell* v. *Clark*, 7 Cranch, 69; *Parkersburg* v. *Brown*, 106 U. S. 487; *Buzard* v. *Houston*, 119 U. S. 347; *Kramer* v. *Cohn*, 119 U. S. 355. Upon this ground alone it would seem that the bill should be dismissed.

II. The decree is outside the case made by the bill. It was a surprise, as well as an injustice to the appellant, who has as fair a name as any person in the city of Richmond. Indeed, it is noticeable that the decree, in stating the deduction of the court from the evidence, does not state that Mr. Tyler had made false representations to Mrs. Savage, *knowing them to be false*, but merely says that the representations were not true; *but it did not follow, necessarily, that Tyler knew they were not true.* The draughtsman of that decree no doubt thought, and properly, too, that it would be a libel upon Mr. Tyler, from a moral point of view, to make the decree recite that that gentleman had wilfully misled Mrs. Savage; and in this way we may account for the remarkable omission from the decree of that necessary element of the plaintiff's case.

An examination of the bill shows that the complainant proceeded on the theory that the defendants Tyler and Otley owed the Virginia Oil Company more than $10,000 for the 50 shares of stock held by each of them, and alleged to have been paid for in a way that was a fraud on the company and its creditors, and the tenacity with which the complainant clung to this point up to the final decree shows that she and her counsel deemed it to be well founded. The bill also claims that the defendant Otley owes the company the further sum of $2500, with interest, the same being money of the company paid him, illegally, as alleged, by Mr. Tyler, as president of the company, for the purpose of retiring the shares of stock held by him. It is manifest, therefore, that the plaintiff considered that she had in these and other supposed assets of the com-

pany an ample fund for the satisfaction of her demand, and that there was no necessity for pressing any claim she might have against Tyler personally, otherwise than as a stockholder who is alleged not to have paid up his stock. Tyler and the other stockholders were made parties to the bill because they were supposed to be debtors to the company on their stock.

The truth is, no doubt, that it was no part of the complainant's original plan of attack to urge a demand against Tyler for the alleged fraud, and that it was not until the complainant's case against the defendants Tyler and Otley, as debtors to the company, broke down, that an attempt was made to hold Tyler personally responsible for the alleged fraud.

The complainant had no right to urge a demand against Tyler covertly, and thereby throw him off his guard and surprise him at the last moment, when it was too late to demur for multifariousness, and the court will presume from the face of the bill that no such improper course was intended, while every doubt in the bill will be resolved against the complainant, according to the well known rule. Upon this ground, also, the decree is invalid, being entirely outside the case made in the bill.

III. Upon the question of fraud we have to say that after a careful examination of this record, we do not hesitate to say that it is incomprehensible to us how the learned judge below could have felt warranted in putting the stigma of this decree on the appellant, who is among the most honorable and respected citizens of Richmond.

Mr. William Wirt Henry for appellee.

Mr. Justice Blatchford delivered the opinion of the court.

It is assigned for error (1) that the record does not present a case for the exercise of jurisdiction in equity; (2) that the decree is outside of the case made in the bill, which is for the enforcement of the corporate liability of the Virginia Oil Company; (3) that the evidence does not warrant the imputation of fraud to the defendants Tyler and the Virginia Oil Company; and (4) that the decree is devoid of support in the record.

(1) It is contended that the only ground on which the bill can be supported against Tyler is, that it contains averments to the effect that he is indebted to the corporation on account of his stock in it; that what is thus owed by him is a part of its assets; and that the plaintiff has an equity to compel payment of the amount thus due, and to subject it to her claim for damages against the corporation. It is contended that, stripped of those averments, the bill is nothing more than a declaration in an action on the case, at law, for the recovery of damages for a false representation; that, as the case stands in the record, with reference to Tyler, it is wholly destitute of equity, and therefore the court decreed on a case that was beyond its jurisdiction; that the only equity which the plaintiff pretended she had against Tyler was to compel him to pay in money for his stock in the company, it being averred that what had been claimed to be a payment for the stock was largely fraudulent and fictitious; that the master did not find that the stock issued to Tyler was not fully paid for, and, the plaintiff having excepted to the report because the master did not so find, the court confirmed his report in that respect; that, as the plaintiff took no appeal, the case was thus left destitute of equity against Tyler, and the bill should have been dismissed; and reference is made, under this head, to the cases of *Russell* v. *Clark's Executors*, 7 Cranch, 69, 89; *Thompson* v. *Railroad Companies*, 6 Wall. 137; *Insurance Co.* v. *Bailey*, 13 Wall. 616; *Parkersburg* v. *Brown*, 106 U. S. 487, 500; *Buzard* v. *Houston*, 119 U. S. 347, 352; *Kramer* v. *Cohn*, 119 U. S. 355, 357; and § 723 Rev. Stat. U. S.

The bill set out a case of fraud practised upon the plaintiff by Tyler, in that, in order to induce her to purchase the $10,000 of stock, he, as president of the company, sent to her the letter of April 10, 1884, upon the statements in which she relied and had a right to rely. It was alleged in the bill that the letter, both by its statements and its omissions, was false and deceitful, and operated as a fraud upon the plaintiff, and that, $10,000 having been obtained from her unlawfully, by the misrepresentations of the affairs of the company by Tyler, its president and duly authorized agent, and having gone into

its treasury and been expended by it, that sum was justly due her by Tyler and the company, with interest, and she had a right to require all the proper assets of the company to be gotten in and applied to the debts due to her and others; that the company was insolvent; and that a receiver ought to be appointed for it.

The bill also required from the defendants answers to the interrogatories which it contained. Tyler and Otley, in their answers to the interrogatories, referred to the books of the company as containing the facts which would give answers to those interrogatories; and Tyler, in his testimony, referred to the books as showing the facts in regard to the condition of the company on June 1, 1884. The information obtained from the answers to the interrogatories and from the proofs in the books showed the insolvent condition of the company on June 1, 1884, and that, as the master reported, it was at that date bankrupt. Tyler must be held to have had knowledge at that time of the condition of the company, as he was its president, and commenced keeping its books about March, 1883; and he is chargeable with knowledge of the facts, reported by the master, that of the $10,000 paid by the plaintiff he received personally the benefit of $6200. The recovery by the plaintiff thus depended largely on the information in the possession of the company and of Tyler, and which was sought for by the bill; and an application of the assets of the company, to replace such of the money paid by the plaintiff as had been used by it, was necessary before Tyler could be made responsible individually for what the assets of the company would not pay.

Thus there were in the case, as ingredients to support the jurisdiction of equity, discovery, account, fraud, misrepresentation and concealment. Story Eq. Jur. §§ 64k, 67, 184, 191; *Jones* v. *Bolles*, 9 Wall. 364, 369.

Under § 723 of the Revised Statutes, the remedy at law, in order to exclude equity, must be as practical and as efficient to the ends of justice and its prompt administration, as the remedy in equity. *Boyce's Executors* v. *Grundy*, 3 Pet. 210, 215; *Insurance Co.* v. *Bailey*, 13 Wall. 616, 620.

In *Russell* v. *Clark's Executors*, 7 Cranch, 69, 89, the bill was one for discovery, and the answer disclosed nothing, the plaintiff supporting his case by testimony in his own possession. In the case now before us, discovery was only one of the grounds of jurisdiction, and the answers to the bill disclosed, through the books of the company, facts which the plaintiff sought to discover.

In *Parkersburg* v. *Brown*, 106 U. S. 487, 500, it was held that there was a plain, adequate and complete remedy at law for the relief granted by the decree. In the present case, discovery was prayed for and made, the affairs of an insolvent corporation were settled up, the subscription to stock made by the plaintiff was substantially cancelled, part of the proceeds of the assets of the company were applied to the repayment of the $10,000, and a decree for the balance was made against Tyler, the agent of the company, who had committed the fraud.

In *Buzard* v. *Houston*, 119 U. S. 347, the ruling was, that a court of equity would not sustain a bill in a case of fraud, to obtain only a decree for the payment of money by way of damages, when the like amount might be recovered in an action at law; and that, if a bill in equity showing ground for legal and not for equitable relief, prayed for a discovery as incidental only to the relief sought, and the answer disclosed nothing, but the plaintiff supported the claim by independent evidence, the bill ought to be dismissed, without prejudice to an action at law.

In *Kramer* v. *Cohn*, 119 U. S. 355, the ruling was, that a bill in equity by an assignee in bankruptcy against the bankrupt and another person, alleging that the bankrupt, with intent to defraud his creditors, concealed and sold his property and invested the proceeds in a business carried on by him in the name of the other defendant, should, on a failure to prove the latter allegation, be dismissed without prejudice to an action at law against the bankrupt.

The present case is not within the rulings in the cases thus referred to.

Moreover, the objection now made to the jurisdiction in

equity was not raised in the court below, by answer or otherwise. It is said in *Thompson* v. *Railroad Companies*, 6 Wall. 134, 137, that usually, where a case is not cognizable in a court of equity, the objection is interposed in the first instance, but that if a plain defect of jurisdiction appears at the hearing or on appeal, a court of equity will not make a decree. The present case, as before demonstrated, so far from showing a plain defect of equity jurisdiction, is a case for its exercise.

In recent cases in this court the subject of the raising for the first time in this court of the question of want of jurisdiction in equity has been considered. In *Reynes* v. *Dumont*, 130 U. S. 354, 395, it was said that the court, for its own protection, might prevent matters properly cognizable at law from being drawn into chancery at the pleasure of the parties interested, but that it by no means followed, where the subject-matter belonged to that class over which a court of equity had jurisdiction, and the objection that the complainant had an adequate remedy at law was not made until the hearing in the appellate tribunal, that the latter could exercise no discretion in the disposition of such objection; and reference was made to 1 Daniell's Chancery Practice, 555, 4th Am. ed.; *Wylie* v. *Coxe*, 15 How. 415, 420; *Oelrichs* v. *Spain*, 15 Wall. 211; and *Lewis* v. *Cocks*, 23 Wall. 466. To the same effect are *Kilbourn* v. *Sunderland*, 130 U. S. 505, 514; *Brown* v. *Lake Superior Iron Co.*, 134 U. S. 530, 535, 536; and *Allen* v. *Pullman's Palace Car Co.*, 139 U. S. 658, 662.

(2) As to the decree being outside the case made in the bill, we think the allegations of the bill as to the fraud are adequate, and that the statement of the decree that the company was represented to the plaintiff by Tyler, its president, to be in a flourishing condition, when in fact it was insolvent, is a sufficient support of the allegations of fraud made in the bill.

The averment of the bill that the $10,000 was justly due to the plaintiff by Tyler and the company, because that sum was unlawfully obtained from her by the misrepresentations of the affairs of the company by Tyler, who was its president and duly authorized agent, and because that sum went into the treasury of, and was expended by, the company, is a distinct

allegation that the $10,000 was justly due to her by Tyler. The further averment that the plaintiff had a right to require all the proper assets of the company to be gotten in and applied to the liquidation of the debts due to her and others, is merely an allegation that her first claim was to have the assets of the company applied to pay her, and that beyond that she had a claim against Tyler personally for the deficiency in such assets. There was a deficiency in the assets of the company, and the decree against Tyler was only for such deficiency.

The relief against Tyler was properly granted under the prayer of the bill for general relief. It was consonant with the facts set out in the bill as a ground of relief against Tyler personally, and it was relief agreeable to the case made by the bill. Story's Eq. Pl. § 40, etc.; *Tayloe* v. *Merchants' Fire Ins. Co.*, 9 How. 390, 406. The bill could not have been successfully demurred to for multifariousness.

As to the assignments of error (3) and (4) we are of opinion, without discussing the evidence in detail, that it sustains the report of the master and the decree. The master reported that on June 1, 1884, the company had lost its entire cash-paid stock and was largely in debt besides; that the formulas and recipes purchased for $8486.84 were then and ever since had been without value, or at least unsalable; and that, in a word, the company was bankrupt. These findings were not excepted to by Tyler or the company. A large part of the money which Tyler had loaned to the company was repaid to him out of the $10,000 paid by the plaintiff. Tyler's letter to the plaintiff of April 10, 1884, in saying, "The last dividend that was declared was a 7 per cent semi-annual. The fiscal year ends on the first of June," was calculated naturally to produce the impression upon the plaintiff's mind that the last dividend was declared on the 1st of June, 1883, whereas the last dividend was June 1, 1882. It must be inferred that, if the plaintiff had been informed that no dividend had been declared since June 1, 1882, she would not have subscribed for the stock. This suppression of a material fact, which Tyler was bound in good faith to disclose, was equivalent to a false representation. *Stewart* v. *Wyoming Ranche Co.*, 128 U. S.

Statement of the Case.

383, 388. The effect of the fraud committed by Tyler enured directly to his personal advantage. Not only was he, as a large stockholder and salaried officer, benefited by the plaintiff's payment into the treasury of the company of the $10,000, but, as already shown, $6200 of that sum went directly to his benefit, and the remainder, he testifies, went to the purchase of material and ordinary expenses of the company. The latter amount enabled the company to continue paying to Tyler his salary for some time longer.

Decree affirmed.

SMALE v. MITCHELL.

QUESTIONS CERTIFIED FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 1418. Argued January 14, 1892. — Decided February 1, 1892.

The provision in the statute of Illinois, (Rev. Stats. c. 45, § 35,) that "at any time within one year after a judgment, either upon default or verdict, in the action of ejectment, the party against whom it is rendered, his heirs or assigns, upon the payment of all costs recovered therein, shall be entitled to have the judgment vacated, and a new trial granted in the the cause" applies to such a judgment rendered in a Circuit Court of the United States, sitting within that State, on a mandate from this court in a case commenced in a court of the State of Illinois, and removed thence to the Circuit Court of the United States.

Ex parte Dubuque & Pacific Railroad, 1 Wall. 69, distinguished from this case.

THE court stated the case as follows:

The defendant in error, Charles H. Mitchell, as plaintiff, commenced an action of ejectment in a state court of Illinois, to recover certain described premises situated in that State, against Jabez G. Smale and others, which action was afterwards on sufficient grounds removed to the Circuit Court of the United States for the Northern District of Illinois. Issue being joined in the action, it was tried by the court without a jury, and upon the facts found judgment was rendered on Feb-

ruary 1, 1886, in favor of the plaintiff for a portion of the demanded premises, and in favor of the defendants for the residue. Judgment being entered thereon, the case was brought to this court on a writ of error, and on May 11, 1891, the judgment was reversed and the cause remanded to the Circuit Court with directions to enter judgment for the plaintiff in conformity with the opinion of this court. 140 U. S. 406. According to that opinion, the plaintiff was entitled to recover a greater quantity of land than that described in the judgment reversed. The declaration contained two counts, each describing a portion of the demanded premises, and the opinion directed that a general judgment be entered for the plaintiff for the property described in both counts. The judgment was reversed accordingly, and the cause remanded with instructions as above mentioned. The mandate of the court issued thereon followed the judgment, and was filed in the court below June 8, 1891; and that court, in obedience thereto, on the 12th of June following, entered a judgment in favor of the plaintiff for the premises described, and ordered a writ of possession to be issued.

On the following day, June 13, 1891, the defendants moved the court to vacate the judgment thus entered, and to grant them a new trial under the statute of Illinois, all costs of the action having been previously paid; but the court, after hearing argument thereon, denied the motion, and to its ruling the defendants excepted.

To review this ruling the defendants, in September, 1891, sued out a writ of error from the Circuit Court of Appeals for the Seventh Circuit, returnable in October following, and assigned as error the refusal of the Circuit Court to vacate the judgment entered on June 12, 1891, and grant a new trial under the statutes of Illinois, the costs having been paid, and the motion made in open court within one year from the rendition of the judgment, and the defendants never having had a new trial in the cause as provided for by that statute.

The case being brought, upon this writ of error, before the Circuit Court of Appeals, was heard on October 5, 1891, and the question arose as to the power of the court below to set

aside and vacate the judgment entered on June 12, 1891, pursuant to the mandate and opinion of the Supreme Court of the United States, and to grant the defendants a new trial, as of course, and simply upon the payment of costs, as provided in the statutes of Illinois relating to the practice in actions of ejectment. The court being advised, it was ordered that the question be certified to the Supreme Court of the United States, pursuant to the sixth section of the act establishing Circuit Courts of Appeals. 26 Stat. 828, c. 517.

On the hearing in the Circuit Court of Appeals the Circuit Judge did not sit, but the court which made the order was held by the Circuit Justice and the District Judge for the Northern District of Illinois, who had been assigned to sit as a member of that court. Upon this certificate the case is now before this court for hearing.

The provisions of the law of Illinois relating to ejectment are contained in sections 34 and 35 of chapter 45 of the Revised Statutes of that State. They are as follows:

"§ 34. Every judgment in the action of ejectment shall be conclusive, as to the title established in such action, upon the party against whom the same is rendered, and against all parties claiming from, through or under such party, by title accruing after the commencement of such action, subject to the exceptions hereinafter named.

"§ 35. At any time within one year after a judgment, either upon default or verdict in the action of ejectment, the party against whom it is rendered, his heirs or assigns, upon the payment of all costs recovered therein, shall be entitled to have the judgment vacated, and a new trial granted in the cause. If the costs are paid and the motion therefor is filed in vacation, upon notice thereof being given to the adverse party or his agent or attorney, or the officer having any writ issued upon such judgment, all further proceedings shall be stayed till otherwise ordered by the court. The court, upon subsequent application, made within one year after the rendering of the second judgment in said cause, if satisfied that justice will thereby be promoted, and the rights of the parties more satisfactorily ascertained and established, may vacate the judg-

ment and grant another new trial; but not more than two new trials shall be granted to the same party under this section."

Mr. William C. Goudy for Smale and others. *Mr. John I. Bennett* was with him on the brief.

Mr. S. S. Gregory for Mitchell. *Mr. William M. Booth* and *Mr. James S. Harlan* were on his brief.

The question to be determined is whether a judgment entered on a mandate reversing a judgment of a Circuit Court and directing a contrary judgment in conformity with the opinion of this court, is a judgment of that court on "default or verdict" within the meaning of the Illinois statute. We contend that that statute refers only to a judgment entered on a default, or trial by the trial court, and not to a judgment on mandate, which is virtually the judgment of this court.

The power of the Supreme Court in reviewing judgments of inferior courts is, in some respects, defined in section 701 of the Revised Statutes. This court does not enter judgments and issue execution as is done in courts of last resort in some of the States, but, having decided the case, remands it to the court below, with directions to enter the appropriate judgment there. When judgment has been entered in accordance with such direction of this court, it becomes in substance and effect the judgment, not of the court to which the case was remanded, but of this court, and as such it is not subject to be superseded or controlled in any way by the court below. *Stewart* v. *Salamon*, 97 U. S. 361; *Humphrey* v. *Baker*, 103 U. S. 736.

This view was taken under the judiciary act of 1789, 1 Stat. 73, c. 20. *Ex parte Sibbald*, 12 Pet. 488. Section 24 of that act is as follows: "And be it further enacted, That when a judgment or decree shall be reversed in a Circuit Court, such court shall proceed to render such judgment or pass such decree as the District Court should have rendered or passed; and the Supreme Court shall do the same on reversals therein, except where the reversal is in favor of the plaintiff or petitioner in the original suit, and the damages to be assessed or

matter to be decreed are uncertain, in which case they shall remand the cause for a final decision. And the Supreme Court shall not issue execution in causes that are removed before them by writs of error, but shall send a special mandate to the Circuit Court to award execution thereupon."

This section might seem to contemplate that this court should render, except in special cases indicated, the appropriate judgment, and, therefore, when this court, instead of entering judgment, sent back a case under that act to the court below for the entry of judgment, it might be argued with much more plausibility than it can be under the section of the Revised Statutes referred to, that the judgment so entered was the judgment of the court below, and not of this court.

But the contrary has been held, as indicated in the case cited, and in a later case, where it may fairly be said the question now before the court was decided adversely to the contention of the plaintiffs in error. *Ex parte Dubuque & Pacific Railroad*, 1 Wall. 69.

This case cannot be distinguished from the one now before this court upon the ground that the Illinois statute permits a new trial as matter of right, whereas, by the Iowa statute, then construed by this court, such new trial is allowed, without cause, only in the discretion of the court. For in that case this court held expressly that the trial court was wholly without power to act upon the judgment of this court, and that the statute applied only to judgments of the trial court. And so, it was held by Judge Wallace, that the Circuit Court cannot entertain a motion for a new trial upon the ground of newly discovered evidence, after mandate from this court, directing final judgment for the plaintiff. *John Hancock Ins. Co.* v. *Manning*, 7 Fed. Rep. 299.

The judgment entered in pursuance of the mandate of this court is not in any ordinary sense the judgment of the court which enters it, but is in substance the judgment of the Supreme Court, and not subject to the ordinary incidents of a judgment entered in the trial court.

The authorities are plain that a judgment of this court, or other court of last resort, is an adjudication conclusive and

binding in that case, whenever it is again presented to the court on substantially the same record. *Dodge* v. *Gaylord*, 53 Indiana, 365; *Smyth* v. *Neff*, 123 Illinois, 310; *Union National Bank* v. *International Bank*, 123 Illinois, 510; *Corning* v. *Troy Factory*, 15 How. 451; *Sizer* v. *Many*, 16 How. 98; *Roberts* v. *Cooper*, 20 How. 467.

On the 1st day of February, 1886, the original judgment was rendered in the case, and that judgment was *against the defendants* — the plaintiffs in error here — and therefore the very moment that judgment was rendered their case was ready for the exercise of their right to have the same vacated, and a new trial as a matter of right.

They have no right whatever to have a new trial as to this part of the land in controversy. Their first application for such new trial was made June 13, 1891, more than five years after the first judgment against them for this tract was rendered. It is true, in the interval, that judgment was reversed by this court, and another judgment entered against them for all the lands in suit.

But it would be a hardship to impose upon a plaintiff the retrial of a case as to land awarded to him in the court below as a penalty for having successfully prosecuted a writ of error in this court to reverse that judgment as to other lands.

Mr. William Prescott filed a brief for Mitchell.

Mr. Thomas Dent, by leave of court, filed a brief for Gertrude Hardin, plaintiff in *Hardin* v. *Jordan*, 140 U. S. 371, who was interested in the question in this case.

Mr. Justice Field, after stating the case, delivered the opinion of the court.

The contention of the plaintiffs in error, the defendants below, is that the mandate of the Supreme Court was fully obeyed when, in pursuance thereof, judgment was entered in the Circuit Court, and that they have the same right after the entry of that judgment to a new trial, according to the pro-

visions of the statute of Illinois, which they would have had if the Circuit Court had on the trial, in the first instance, rendered such judgment. On the other hand, the contention of the defendant in error, the plaintiff below, is that the judgment entered by direction of the Supreme Court of the United States is final, and that the right to a second trial given by the statutes of Illinois to the losing party in ejectment does not apply where the judgment against such party is entered by direction of that court.

It is insisted at the outset that the statute of Illinois confers a right to a new trial in ejectment only when the judgment is rendered upon default or verdict, and does not apply to cases where it is entered upon the mandate of an appellate court, the latter judgment not being within its language or intent. We are unable to agree in this respect with counsel. By a judgment upon a verdict the statute evidently intended to embrace all cases where the decision upon which the judgment was entered had been given upon contestation, as distinguished from one upon default; and the reason of the law is as applicable to all judgments in such cases as to those entered upon verdicts of a jury. *Chamberlin* v. *McCarty*, 63 Illinois, 262.

By the common law the action of ejectment was purely one of possession, and as it proceeded upon a fictitious demise between fictitious parties, its determination decided nothing beyond the right of the plaintiff at the date of the alleged demise. A new action upon the allegation of a different demise might immediately be instituted. It was only after repeated verdicts in such cases in favor of the plaintiff that the real claimant could apply to a court of equity to quiet the possession and put an end to the fruitless litigation respecting the property. A judgment in ejectment in an action was consequently not a bar to a second action for the same premises.

The law of Illinois changes this rule of the common law, and makes a judgment in the action of ejectment conclusive as to the title established in such action upon the party against whom it is rendered, and parties claiming under him by title arising after the commencement of the action, subject to cer-

tain exceptions named. Those exceptions provide in two cases for a second trial of the action. One is after the first trial and judgment; the party against whom the judgment has been rendered, or his heirs or assigns, is entitled to have the judgment set aside and a new trial granted within one year from the date of the judgment, upon the payment of all costs in the action. The new trial in such case is a matter of right, upon the mere application of the party. The other is after the second trial and judgment; then a new trial may be granted, upon the application of the losing party, if the court is satisfied that justice would be thereby promoted, and the rights of the parties be more satisfactorily ascertained and established. But only two trials can be granted to the same party.

This absolute right of a party against whom a judgment in ejectment has been rendered in such cases to a second trial, upon his application and payment of costs in the action, is esteemed in Illinois to be a valuable one. The statute which authorizes it is there regarded as conferring a substantial right, in that it increases the security of holders of real property, that in case their title is brought into litigation it will be more fully examined and satisfactorily ascertained and established than by confining the parties to a single trial, as in other controversies except where another trial is ordered for cause. In the courts of that State this right is secured in all cases of ejectment. As it is a valuable one, there would seem to be every reason why it should be enjoyed when the action was commenced in a state court, and for good cause removed to a court of the United States, there being nothing in the practice of the latter court or in the laws of Congress which prevents or impedes its enjoyment. If there existed any such objection in the practice of the Federal courts, or in any law of Congress, as prevents the trial of equitable defences to an action at law which are allowed in some state courts, the second trial in ejectment simply upon the application of the party and the payment of the costs might properly be refused; but there exists, as stated, no such objection. It is not the purpose of the statutes of the United States, which authorize the removal of causes from a state court to a Federal court, to deprive

either party of any substantial right, but to secure to the parties all such rights which could be claimed in the state courts when capable of enforcement under the settled Federal practice.

The duty of the Federal courts to follow the practice of the state courts in cases like the present one, where the law of the State allows a new trial in actions of ejectment without showing cause, is recognized by this court in *Equator Co.* v. *Hall*, 106 U. S. 86, 88. That was an action in the Circuit Court of the United States against a mining company to recover possession of a silver mine in Colorado. The case was, by agreement of parties, submitted to the judge of the court, who found for the defendant and rendered judgment in his favor. Thereupon the plaintiffs paid the costs of the action up to that time, and under the provisions of a section of the Code of Civil Procedure of that State moved for and obtained a new trial without showing any cause. At a subsequent term the case was again tried, and the jury returned a verdict for the plaintiffs, on which judgment was entered. The defendant then, without showing cause, moved for a new trial, which was claimed to be a matter of right under the same section of the code under which the previous new trial had been granted. The judges of the court were divided in opinion on this motion, and certified the question to this court. The section of the Code of Colorado under which the motion was made was as follows:

"Whenever judgment shall be rendered against either party under the provisions of this chapter, it shall be lawful for the party against whom such judgment is rendered, his heirs or assigns, at any time before the first day of the next succeeding term, to pay all costs recovered thereby, and, upon application of the party against whom the same was rendered, his heirs or assigns, the court shall vacate such judgment and grant a new trial in such case; but neither party shall have but one new trial in any case, as of right, without showing cause. And after such judgment is vacated, the cause shall stand for trial the same as though it had never been tried."

In disposing of the question this court referred to the fictions in the action of ejectment at common law, and to the inconclusiveness of the results of such actions, and observed that this form of action had been abolished in some of the States, and that in abolishing it with its accompanying evils, and in substituting an action between the real parties, plaintiff and defendant, it was found necessary to provide a rule on the subject of new trials in actions concerning the titles of land. While these provisions, said the court, were not the same in all States, it was believed that almost all of them had made provision for one or more new trials as a matter of right. The court added: "We are of opinion that when an action of ejectment is tried in a Circuit Court of the United States according to the statutory mode of proceeding, that court is governed by the provisions concerning new trials as it is by the other provisions of the state statute. There is no reason why the Federal court should disregard one of the rules by which the state legislature has guarded the transfer of the possession and title to real estate within its jurisdiction. *Miles* v. *Caldwell*, 2 Wall. 35."

That decision goes beyond the requirement of this case, for that action was commenced in a Federal court, while here it was begun in a state court, and subsequently removed to the Circuit Court of the United States. It is only necessary to hold that in this case the same right to a second trial can be claimed and enforced as if the action had never been thus removed.

Against this view the defendants in error cite section 701 of the Revised Statutes of the United States, which prescribes the power of the Supreme Court in reviewing the judgment of inferior courts as follows:

"The Supreme Court may affirm, modify or reverse any judgment, decree or order of a Circuit Court, or District Court acting as a Circuit Court, or of a District Court in prize causes, lawfully brought before it for review, or may direct such judgment, decree or order to be rendered, or such further proceedings to be had by the inferior court, as the justice of the case may require. The Supreme Court shall not issue execution in

a cause removed before it from such courts, but shall send a special mandate to the inferior court to award execution thereupon."

They contend that, the Supreme Court having rendered its decision and remanded the case to the court below, with directions to enter the appropriate judgment, the judgment thus entered becomes in substance and effect the judgment, not of the court to which it was thus remanded, but of the Supreme Court, and that it is not within the power of the lower court to change its results or directions in any respect. Undoubtedly, in ordinary cases, a new trial cannot be granted by the court below, except for good cause, and in the exercise of its sound judgment, and it is not within its power, in entering the judgment of the Supreme Court, to award a new trial; and it only remains to carry the judgment into execution.

But this rule cannot apply to an action of ejectment, where the party is entitled by the law of the State in which the action arose to a new trial without showing cause, and in regard to which the trial court possesses no discretion. The judgment entered in an action of ejectment in such case, by direction of the Supreme Court, stands subject to the same control by the lower court as if thus rendered in the first instance.

The defendants in error also cite in support of their position the case of *Ex parte Dubuque & Pacific Railroad*, 1 Wall. 69. At first sight this decision would seem to be an authority for their position, but upon examination it appears that the new trial there depended upon the discretion of the court, and that there was not, as mistakenly stated, any statute at that time in Iowa which gave the party a right to a new trial as a matter of course. It appears from the record in that case, that after the mandate had gone down, and judgment had been entered in obedience to it, affidavits were presented and a motion made for a new trial, which was granted by the court; and that subsequently a mandate was issued by this court commanding the court below to vacate the order. That case, therefore, as correctly stated by counsel, falls within the class where the litigation was ended with the first trial, and its

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decision does not apply to those cases of ejectment where more than one trial is directly allowed by statute.

Our conclusion is, that

The plaintiffs in error were entitled to a new trial, upon their application in the Circuit Court and payment of costs, without showing other cause than that a judgment was entered against them within the year. This conclusion will be certified to the Circuit Court of Appeals, upon which that court will proceed to render the proper judgment in the case pending before it; and it is so ordered.

In re RAPIER, Petitioner.

In re DUPRÉ, Petitioner.

In re DUPRÉ, Petitioner.

ORIGINAL.

Nos. 7, 8, 9, Original. Argued November 16, 17, 1891. — Decided February 1, 1892.

Section 3894 of the Revised Statutes, as amended by the act of September 19, 1890, 26 Stat. 465, c. 908, which provides that "no letter, postal card or circular concerning any lottery . . . and no list of the drawings at any lottery . . . and no lottery ticket or part thereof . . . shall be carried in the mail, or delivered at or through any post-office, or branch thereof, or by any letter-carrier"; and that no newspaper "containing any advertisement of any lottery" "shall be carried in the mail, or delivered by any postmaster or letter-carrier"; and that "any person who shall knowingly deposit or cause to be deposited . . . anything to be conveyed or delivered by mail in violation of this section . . . shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine of not more than five hundred dollars or by imprisonment for not more than one year," is a constitutional exercise of the power conferred upon Congress by Art. I, sec. 8 of the Constitution, to establish post-offices and post-roads, and does not abridge "the freedom of speech or of the press," within the meaning of Amendment I to the Constitution.

Ex parte Jackson, 96 U. S. 727, affirmed to the points;

(1) That the power vested in Congress to establish post-offices and post-roads embraces the regulation of the entire postal system of the country, and that under it Congress may designate what may be carried in the mail and what excluded;

Statement of the Case.

(2) That in excluding various articles from the mails the object of Congress is, not to interfere with the freedom of the press, or with any other rights of the people, but to refuse the facilities for the distribution of matter deemed injurious by Congress to the public morals;

(3) That the transportation in any other way of matter excluded from the mails is not forbidden.

THESE were three applications to this court for leave to file petitions for writs of habeas corpus. Leave was granted, March 9, 1891, and the petitions were made returnable on the third Monday of the next April. They were duly returned, and were on the 27th of April assigned for argument at the present term. The prayer in each case was for a discharge from arrest for an alleged violation of the provisions of section 3894 of the Revised Statutes, as amended by the act of September 19, 1890, 26 Stat. 465, c. 908, generally known as the anti-lottery act, which is printed in the margin.[1]

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[1] Chap. 908. An act to amend certain sections of the Revised Statutes relating to lotteries, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section thirty-eight hundred and ninety-four of the Revised Statutes be, and the same is hereby, amended to read as follows:

"SEC. 3894. No letter, postal-card or circular concerning any lottery, so-called gift-concert, or other similar enterprise offering prizes dependent upon lot or chance, or concerning schemes devised for the purpose of obtaining money or property under false pretences, and no list of the drawings at any lottery or similar scheme, and no lottery ticket or part thereof, and no check, draft, bill, money, postal-note or money order for the purchase of any ticket, tickets or part thereof, or of any share or any chance in any such lottery or gift enterprise, shall be carried in the mail or delivered at or through any post office or branch thereof, or by any letter-carrier; nor shall any newspaper, circular, pamphlet or publication of any kind containing any advertisement of any lottery or gift enterprise of any kind offering prizes dependent upon lot or chance, or containing any list of prizes awarded at the drawings of any such lottery or gift enterprise, whether said list is of any part or of all of the drawing, be carried in the mail or delivered by any postmaster or letter-carrier. Any person who shall knowingly deposit or cause to be deposited, or who shall knowingly send or cause to be sent, anything to be conveyed or delivered by mail in violation of this section, or who shall knowingly cause to be delivered by mail anything herein forbidden to be carried by mail, shall be deemed guilty of a mis-

Statement of the Case.

Rapier was arrested under an information in the District Court for the Southern District of Alabama.

Dupré was arrested under two indictments in the Circuit Court for the Eastern District of Louisiana.

The charge against Rapier, and against Dupré in one indictment, was the mailing of a newspaper containing an advertisement of the Louisiana Lottery; and in the other indictment against Dupré was for the mailing of a letter concerning it.

As a cause for the issue of the writ Rapier said, in his application: "Your petitioner avers that he is now in the custody of said marshal under or by color of the authority of the United States and in violation of the Constitution of the United States. Your petitioner is advised that the pretended statute under which he is being prosecuted and held is in violation of the Constitution of the United States, and that the said District Court is without jurisdiction in the premises."

Dupré in No. 8 averred that he was "deprived of his liberty under and by color of the authority of the United States and of said court and in violation of the Constitution of the United States and of his rights as a citizen thereof, because he says that he is advised and therefore avers that the statute of the United States under which he is held and being prosecuted upon said indictment is unconstitutional, null and void, and particularly obnoxious to and in violation of the first amendment to said Constitution, which forbids Congress passing any law abridging the freedom of the press, and that therefore said Circuit Court is and was without jurisdiction in the premises, and he is deprived of his liberty without authority of law."

His petition in No. 9 contained substantially the same averment.

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demeanor, and on conviction shall be punished by a fine for not more than five hundred dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment for each offence. Any person violating any of the provisions of this section may be proceeded against by information or indictment and tried and punished, either in the district at which the unlawful publication was mailed, or to which it is carried by mail for delivery according to the direction thereon, or at which it is caused to be delivered by mail to the person to whom it is addressed."

Mr. Carter's argument for Petitioner.

Mr. Hannis Taylor for Rapier.

Mr. James C. Carter and *Mr. Thomas Semmes* for Dupré.

Mr. Attorney General and *Mr. Assistant Attorney General Maury* for the United States.

These cases were argued by the above named counsel, an extension of time being allowed by the court. In view of the impossibility of reporting all *seriatim*, the arguments for the petitioners are represented below by a synopsis of *Mr. Carter's* brief, and those for the government by an abstract of *Mr. Maury's* argument.

Mr. James C. Carter for Dupré, petitioner.

I. The power of Congress is limited in two ways. *First*, it can exercise no power which has not been conferred upon it by the Constitution. *Second*, it cannot exercise the powers which have been thus bestowed in ways, or for purposes, which the Constitution forbids.

Our first proposition is that the statute in question is invalid, as being an attempt to exercise powers not conferred upon Congress.

1. It is not denied that Congress, in the exercise of the power conferred upon it by the Constitution "to establish post-offices and post-roads," is clothed with the full incidental power of regulating such offices and roads; — in other words, of regulating the mail service. Nor is it denied that this incidental power of regulation embraces the power of so limiting the carriage of matter by mail as to render that service practicable; and consequently embraces a power of excluding matter from the mails for that purpose and to that extent. What we do assert is that any incidental powers which Congress may thus exercise must be such only as, in the language of the Constitution, "are necessary and proper" for carrying into execution a general power expressly conferred; and that whether any such incidental power is "necessary and proper"

must be, as this court has always regarded it, a judicial question. *McCulloch* v. *Maryland*, 12 Wheat. 316, 420.

The first form which the judicial inquiry assumes is, whether the means employed by Congress in executing its admitted powers are appropriate, and apparently conducive to the legitimate end. If they are so, it matters not whether or not they are the best and most effective means. Congress may fail in the effort to select these. But they must be means; in other words, they must have some relation to the end — some tendency to accomplish it. Applying this test the statute in question is plainly invalid. This seems scarcely to admit of debate.

The legitimate end is to furnish mail facilities to the people of the United States; and this means to all the people of the United States. But the statute in question makes the *moral character* of the matter the sole ground of exclusion. The fact that the mail service has been maintained for a century without such exclusion is sufficient to show that it is not *conducive* to the mere end of establishing a mail service.

We are not, at this moment, objecting that the statute is invalid because aimed to accomplish an object beyond the power of Congress, or because forbidden by some express prohibition of the Constitution. Our argument now is that being an attempted exercise of incidental powers it is condemned by an implied prohibition of the Constitution, because the means employed by it plainly appear to be in no manner conducive to the only legitimate end for which we now assume they could be employed, namely, the maintenance of the mail service. *United States* v. *Fox*, 95 U. S. 670; *United States* v. *Reese*, 92 U. S. 214; *Dent* v. *West Virginia*, 129 U. S. 114; *Cummings* v. *Missouri*, 4 Wall. 277; *Ex parte Garland*, 4 Wall. 333.

Courts of justice always avoid, so far as possible, any inquiry into the *motives* of legislators. They never indulge in it so far as to seek, through the instrumentality of evidence, what such motives are, with the view of invalidating the exercise of admitted powers. A grant which a legislature has authority to make cannot be avoided by proof of fraud in the individual legislators. *Fletcher* v. *Peck*, 6 Cranch, 87. But

it is often the case that an act of a legislative body may be conducive to either of two objects, one of which may be within the scope of the legislative power, and the other beyond it. In such cases if the manifest purpose, or the necessary effect, of any legislation be to reach an end beyond the legislative power, it is condemned as unconstitutional. The illustrations of this rule of action are multitudinous. *City of New York* v. *Miln*, 11 Pet. 102; *The Passenger Cases*, 7 How. 283; *Barbier* v. *Connolly*, 113 U. S. 27; *Soon Hing* v. *Crowley*, 113 U. S. 703; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Morgan's Steamship Co.* v. *Louisiana*, 118 U. S. 455; *Ouachita Co.* v. *Aiken*, 121 U. S. 444; *Minnesota* v. *Barber*, 136 U. S. 313. In the latter case it is held that, in applying this doctrine, while we are not permitted to inquire by means of facts given in evidence, into the motives of individual legislators, we are permitted and enjoined to ascertain the purpose, so far as it is manifest upon the face of the legislation, or inferable from its necessary effects.

It would, of course, be entirely repugnant to the spirit of the Constitution, and to the equality of the States and the general government in their respective spheres of sovereign action, if the same rule were not applied in determining the validity of a congressional enactment. Applying this doctrine to the statute before the court, and inquiring what its natural and necessary effect and its manifest purpose are, no one will pretend that there is room for doubt. It was passed simply and solely for the purpose of disfavoring, and, if possible, of suppressing lotteries. It is not necessary to resort to the report of the committees introducing the original bill, and which openly avows this as the sole purpose, for it is obvious and undisputable on the face of the act itself. And so it has been declared by this court. *Ex parte Jackson*, 96 U. S. 727. Here the argument upon this branch of the case properly closes; for no one will assert that Congress has power to suppress lotteries any more than it has to suppress any other employment or pursuit.

2. But it would be an oversight to omit to notice a different view upon which an attempt may be made to defend the

validity of this legislation, a view indeed upon which the bill already referred to forbidding the delivery of alleged incendiary abolition documents was defended by Senator Buchanan in 1836, in the Senate of the United States. That distinguished statesman insisted that the proposed measure should not be viewed as an affirmative exclusion of such documents from the mails, but as a refusal by the government to become an agency to furnish means and facilities for the circulation of such publications. And it may be asked here, as he asked in respect to abolition publications, "must the United States make itself the agent of dealers in lotteries and facilitate that business?" It must be that there is some plausibility in this argument, since it has commanded the assent of such able minds; but it has nothing more than plausibility.

Inasmuch as a denial of mail facilities to persons wishing to carry on any particular pursuit must, of necessity, so far impede it as to greatly abridge the extent to which it may be carried on, and in many instances render it impossible; and as the argument under notice asserts the absolute right of Congress, in its uncontrollable discretion, to refuse the facilities in any case, (and such was Mr. Buchanan's view,) it involves the assertion that Congress has the right, by such action, to break up, or impede, any business or employment. It also involves the assertion, generally, that Congress, in making provision for the actual and beneficial enjoyment by the people of the powers, privileges and franchises bestowed by the Constitution, is clothed with a discretion, wholly arbitrary, to give them here, and withhold them there, as it may please. But the doctrine of this court is that the fundamental rights of citizens — and these, certainly, must include all the rights and privileges which are bestowed by the Constitution — can be taken away only by due process of law; and this does not include the arbitrary mandate of the legislature. *Dent* v. *West Virginia*, 129 U. S. 114, 123; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369; *Loan Association* v. *Topeka*, 20 Wall. 655, 662, 663; *Ex parte Curtis*, 106 U. S. 371, 376, dissenting opinion of Mr. Justice Bradley.

3. But we insist that Congress has no power to exclude

matter concerning lotteries from the mails on the ground that the circulation of such matter would have an immoral or injurious tendency. That this was its real purpose has already been shown. In enacting that statute it was not exercising the power of regulating the mail service, for there was no relation between the means employed and *that* end. The real power which it attempted to exercise was to hamper and impede, and, if possible, to destroy, the lottery business, in order to protect the people of the United States from the assumed demoralizing and dangerous tendency of lotteries. Inasmuch as no one pretends that Congress may pass a law directly suppressing lotteries on the ground that they have an immoral tendency, or, indeed, on any ground whatever, the question is whether it can pass a law, not directly suppressing them by declaring them to be crimes, but harassing and obstructing them by withdrawing from them facilities which are under its control for no other reason than that it deems them crimes which it would suppress if it had the power? This question must be promptly answered in the negative, for the power thus attempted to be exercised is a power to suppress lotteries and that alone. No such power can be derived from any express language in the Constitution, nor by any just implication from any language in it. More than this, the possession of any such power by Congress is utterly inconsistent with the whole theory of the constitutional relations between the general government and the States. Against all such views we respectfully insist that where Congress cannot by direct legislation pronounce a business to be a crime and punish it as such, but that power has been reserved to the States, it is not competent to Congress to determine it to be a crime, and to deprive it of the benefit of the mails for the sole purpose of endeavoring to suppress it. What cannot be done directly cannot be done indirectly. Cooley's Constitutional Limitations, 208; *Taylor* v. *Commissioners of Ross County*, 23 Ohio St. 22.

A plausible attempt may be made to retort upon us the argument drawn from possible consequences. "Is it true, then," it may be asked, "that the government of the United

States is placed in the singular attitude that it cannot discharge its duty of maintaining a mail service without extending the facilities which that service affords to criminals of every description to aid them in the commission of crime? Cannot that government decline to become the principal instrumentality in the circulation, for instance, of obscene books and pictures, without an entire abrogation of its postal service? Are the statutes passed for that purpose also invalid?" Whatever force the argument thus suggested may seem to have is more apparent than real. It is founded upon a failure to notice fundamental distinctions in the nature of criminal offences.

The grand and principal distinctions between right and wrong, between what is criminal and what is innocent, (and we mean the practical and existing distinctions, and not absolute or theoretical ones,) are not created by laws. They exist in the minds of men antecedently to formal government, and are indeed a preliminary condition to the organization of any political society. It is not possible that such a society should subsist, except where one part is under subjugation to the other, unless there is a general concurrence among its members in relation to these distinctions. Propinquity, common origin and mutual intercourse produce this concurrence, and at the same time generally determine the territorial limits of the political organization. The laws are, for the most part, merely a recognition of the moral opinions of the members of the State, and are designed to enforce conformity in conduct.

When the government of the United States was formed, with legislative and judicial powers, it must have been assumed that those powers would be exercised in accordance with the rules of morality — those distinctions between right and wrong — which obtained universally in the societies over which it was to extend. But, on the other hand, political societies have the power to create new distinctions between right and wrong, and thus to declare practices before regarded as innocent, or indifferent, to be criminal offences and to punish them as such. Every completely sovereign power is clothed with this function; but a government not completely sovereign may or may

not have it. The charter of its powers must be scrutinized in order to ascertain how far its authority in this direction extends.

Turning to the division of powers made by our Constitution between the States and the general government, we find, as its most distinctive feature, that certain enumerated powers were awarded to the latter, and all others reserved to the former. And among the powers so reserved most certainly that of determining what new things should be declared and treated as criminal offences against the good order of society was embraced, except so far as distinct powers of legislation upon particular subjects were conferred upon the general government.

There is, therefore, a well defined line which limits the extent to which the general government can act as a moral person, and regulate its powers so as to favor or disfavor particular acts of individuals in the States. That line is, in general, coincident with the boundary everywhere recognized as separating *mala prohibita* from *mala in se*. A *malum in se* is a thing absolutely evil in itself; not indeed absolutely in a philosophical sense, but absolutely according to the universal conviction in the political society which so views it; and *mala prohibita* are those things, otherwise indifferent or innocent, which the legislative power having control over the subject may declare to be offences. This distinction enables the government to exclude from the mails all matter promoting such acts as it has the authority to declare to be criminal offences and to punish as such; and also all matter promoting what were, at the time of the adoption of the Constitution (and possibly what in the progress and development of our society may come to be) universally regarded as *mala in se*, including all such crimes as murder, arson, burglary, larceny, etc. And in this latter class the offence of circulating obscene books and pictures undoubtedly falls. This was a well known offence at common law. Lord Campbell in *Dugdale's Case*, 1 Dearsly Crown Cas. 64, 75; Holt's Laws of Libel, 73.

The question then, is, "are lotteries and dealing with lotteries *mala in se?*" Upon this no argument need be employed. The common conviction of men has never so regarded them.

Universally allowed at the time of the adoption of the Constitution, and still allowed in some of the States, they can only be regarded as among that class of things which may be made *mala prohibita*. And so it has been declared in an authoritative decision of this court. *Stone* v. *Mississippi*, 101 U. S. 814, 821.

II. But the statute in question is invalid, not only for the reason that none of the powers conferred upon Congress were sufficient to authorize it, but also because Congress was by an express restriction upon the exercise of those powers, prohibited from making such a law. It is a law "abridging the freedom of the press" within the meaning of the First Amendment.

1. It is important to keep in mind throughout this discussion, that the constitutional safeguard thus invoked is not so much a limitation upon the express powers enumerated and granted to Congress, as it is a restriction upon the legislative means to be employed in the exercise of those powers. Speaking with precision, it is a restriction upon the incidental powers which Congress may exercise in carrying out its express powers.

2. Any discussion of the question, whether an enactment of Congress abridges the "Liberty of the Press," should properly start with a clear statement of what that phrase imports, or rather what it imported at the time of the adoption of the Federal Constitution, for it was the particular Liberty of the Press which then existed, which was, and is, protected by the constitutional safeguard.

3. Our proposition is, that this Liberty of the Press imported the liberty of free discussion in print, without any restraint, save that which was imposed by the law of libel as it then existed in the jurisprudence of England and her American Colonies.

After reviewing at length the struggle for freedom of the press, and for trial by jury in prosecutions for libel in England, for a century and a half, *Mr. Carter* continued:

The question is, in what sense the term "Liberty of the Press" was employed in the First Amendment. How can we doubt that the framers of the Constitution, themselves devoted

to free principles of government, detesting the doctrines of arbitrary power, with the spectacle then actually before their eyes of the conflict going on in England between rival views — a struggle in which all who had been their friends were upon the popular side — a struggle substantially finished by the triumph of that side — intended by the phrase "Liberty of the Press" precisely that liberty which was not only guarded by exemption from previous restraint, but defended by the safeguard of a jury trial?

The contemporaneous exposition by those principally instrumental in the framing of the Constitution is in entire accordance with the foregoing views. It is nowhere better expressed than in Hamilton's masterly brief in the celebrated case of *The People* v. *Croswell*, an indictment for a libel upon Thomas Jefferson, President of the United States.

"I. The liberty of the press consists in the right to publish with impunity truth, with good motives, for justifiable ends, though reflecting on government, magistracy or individuals.

"II. That the allowance of this right is essential to the preservation of free government — the disallowance of it fatal.

"III. That its abuse is to be guarded against by subjecting the exercise of it to the animadversion and control of the tribunals of justice; but that this control cannot safely be entrusted to a permanent body of magistracy, and requires the effectual coöperation of court and jury.

"IV. That to confine the jury to the mere question of publication and the application of terms, without the right of inquiry into the intent or tendency, referring to the court the exclusive right of pronouncing upon the construction, tendency and intent of the alleged libel, is calculated to render nugatory the function of the jury, enabling the court to make a libel of any writing whatsoever, the most innocent or commendable.

"V. That it is the general rule of criminal law, that the intent constitutes the crime, and that it is equally a general rule that the intent, mind or *quo animo*, is an inference of fact to be drawn by the jury.

"VI. That if there are exceptions to this rule they are con-

fined to cases in which not only the principal fact, but its circumstances, can be and are defined by statute, or judicial precedent.

"VII. That in respect to libel there is no such specific and precise definition of facts and circumstances to be found; that consequently it is difficult, if not impossible, to pronounce that any libel is, *per se* and exclusive of all circumstances, libellous; that its libellous character must depend upon intent and tendency, the one and the other being matters of fact."

This precise and elegant statement of the law was supported by a luminous argument reviewing the whole law of libel and its history, showing that it was the ancient law, and that Mr. Fox's act was declaratory merely. It received the full assent of Kent, afterwards Chancellor, whose opinion contains a most elaborate scrutiny of the doctrine of Lord Mansfield in *King* v. *Woodfall*, 20 State Trials, 895, and declares that he and the judges who followed him had "involved themselves in inconsistency and paradox; and I am induced to believe that it is a departure from the ancient, simple and true history of the trial by jury in criminal cases." Hamilton's Works, ed. 1886, vol. 7, p. 333; ed. 1851, vol. 7, p. 849; *People* v. *Croswell*, 3 Johns. Cas. 336, 365.

4. It may be assumed, therefore, that the phrase "freedom of the press," as employed in the First Amendment, imported that measure of liberty which permits, without previous restraint, the publication of any writing whatever, and without the restraint of any subsequent penalty, unless it should be found by a jury on a regular trial to be such a publication as the law then condemned as libellous. The immediate purpose and effect of the amendment was to place this great safeguard of liberty beyond the peril of the exercise even of the legislative power.

5. Having determined the import of the term "freedom of the press," as employed in the First Amendment, we are now prepared for the main inquiry whether the statute in question is a law abridging that freedom. That such is its character is very clear. That freedom includes not only the liberty of printing, but the liberty of publishing. The former would be empty

indeed without the latter. And the liberty of publishing must be coextensive with the liberty of printing. Publishing and circulating are admitted to be synonymous. *Ex parte Jackson*, *supra*. And what was the liberty of publishing, which existed at the time of the adoption of the Constitution? It was the liberty of circulating printed matter in all practicable and permissible forms, of which that by mail was by far the principal mode. It included letters, newspapers and packets.

Does the statute in question abridge the freedom of circulation? We make no effort to conceal the embarrassment which attends any discussion of this question since the decision of this court in *Ex parte Jackson*, 96 U. S. 727. That the statute was within the powers of Congress, aside from any express restriction, it would seem, was silently assumed, rather than considered and determined by that decision; but the point that it was invalidated by the restriction seems to have been made and passed upon. We cannot, however, but think that it was inadequately presented, and this court has not been in the habit of placing a vital question of constitutional law beyond the reach of agitation until its merits have been thoroughly discussed. The attention of the court is, most respectfully, but earnestly, solicited to the following considerations which seem to demonstrate that the statute does abridge the freedom of circulation, and, by consequence, the freedom of the press.

The meaning of the term "abridge" will surely not be disputed. It is not synonymous with destroy, deprive or take wholly away. It means to shorten, to curtail, to contract, to diminish. The principal, if not the only mode of circulating, at the time of the adoption of the Constitution, such printed matter as newspapers, pamphlets and circulars, was by mail. It has always been so, and must become more and more so as society advances. We submit it to candid minds to say whether the freedom of circulating printed matter, which is admitted to be synonymous with the freedom of the press, is shortened, curtailed, contracted, diminished or, in other words, abridged, when the natural, appropriate and principal means by which such matter may be circulated is absolutely taken away.

Under this statute no man can circulate a newspaper in any State except upon condition that he consents to forego the benefit to be derived from any such advertisement, although it may be entirely legal in such State. Of course the conditions may, if this be allowed, be extended to any other advertisement relating to any business or subject; and thus the power is directly asserted by this legislation of Congress to control the character of the whole newspaper press; for no one will pretend that the publication of newspapers is possible, on any large scale, if the benefit of the mail service is denied to them.

And still further: The statute creates a censorship. Had it forbidden only the depositing in the mail of the matter described, it might be urged that every one was at liberty to make such deposit, subject to the hazard of being indicted and punished, and, therefore, that there was no previous restraint. But the prohibition forbids the postmaster from delivering any such newspaper, circular, pamphlet or publication. It arrests publication, for it arrests the communication of the matter to the public, or to those for whom it is intended. And whether publication should be thus arrested is submitted to the judgment of a postmaster. This is a perfect restoration of the censorship.

It may possibly be suggested that the purpose of the act in question is not in any manner to impair or abridge free discussion of any question, but to break up a certain business or certain practices. If such suggestion is designed to show that the statute is limited, or should be construed to be limited, to such acts as are parts of some business transaction in relation to a lottery, it must be rejected. Whatever is fairly embraced within the language of the act must be deemed to have been intended by it. Courts cannot cut down the scope of an enactment as marked out by its language on the basis of a supposal that Congress must be deemed to have intended only what was constitutional and reasonable. This may be done when the language employed suggests a doubt, but is quite inadmissible where the doubt is whether the legislature has power to do what it has plainly attempted. Courts cannot legislate.

Mr. Carter's argument for Petitioner.

Our argument in no manner involves the consequence that the existing legislation of Congress, excluding obscene books and pictures from the mails, is invalid, as abridging the freedom of speech. It will be perceived upon referring to the observations concerning this legislation hereinbefore made, that the power and the duty of Congress to refrain from so exercising its express powers as to facilitate the commission of crime was distinctly admitted. What was denied was that Congress had the power to exclude matter as being criminal which was not criminal *per se*, which was not regarded as criminal at the time of the adoption of the Constitution, which was then permitted, if not encouraged, in most, if not all the colonies, was still permitted and protected in some of the States, and over which, as being criminal or innocent, Congress had no direct power whatever.

Our statute making the circulation by mail of such matter a penal offence, follows rigidly the principle which governs such indictments. There must be a jury trial, and the question whether the books or pictures are obscene — in other words, whether they are libellous — is always an issue of fact determinable by the jury alone. But if Congress had undertaken to describe and condemn particular books or publications as promotive of murder, arson or any other crime, or as being obscene, and make the circulation of those a penal offence, thus taking away from the jury the determination of the question of their guilty tendency, the prohibition contained in the First Amendment would have been distinctly violated. It is precisely here that the legislation under notice exhibits its vice. It leaves to no jury the power to determine whether any publication relating to a lottery — a remonstrance against them, an argument for them, an advertisement of them, any expression of views concerning them — is of evil design and tendency. If the matter relates to lotteries, proof of mailing is enough. All else is a question of law and the jury must convict.

III. It is very respectfully submitted that the consideration and decision of the questions herein discussed should not be embarrassed by the judgment in *Ex parte Jackson*, 96 U. S. 727. The question whether Congress could exercise a power

of excluding matter from the mails solely because of the subject to which it related, and not with any view of making the service more practicable, convenient and useful seems not to have been debated. Nor does the question seem to have been debated whether Congress could employ an incidental power in order to repress a business or practice within a State over which it had under the Constitution no control. It seems to have been hastily assumed that, inasmuch as the regulation of the whole postal system was lodged with Congress, any laws passed by Congress in relation to that system must be deemed to be regulation; and that "the right to designate what should be carried, necessarily involves the right to determine what should be excluded." Upon the question whether the law abridged the freedom of the press the doctrine declared seems open to much question, and induces the belief that it could not have been adequately presented in argument.

Mr. Assistant Attorney General Maury opposing.

Unless the case of *Ex parte Jackson*, 96 U. S. 727, is to be reversed, it is conceded that the writs prayed for in these petitions must be denied. I shall aim to show that that decision rests on sound principles of constitutional law.

The whole system of the transportation of the mails is built upon the power to establish post-offices and post-roads. *Legal Tender Cases*, 4 Wall. 457, 537. In the somewhat inadequate language of the power, and in the studied reticence of the Constitution in regard to it, we find an invitation to Congress to use a wide discretion as to ways and means. Under this power Congress has established a comprehensive postal service, and enacted laws regulating it, one of which is section 3894 of the Revised Statutes, as amended by the act of September 19, 1890, 26 Stat. 465, c. 908, which provides that no newspaper, circular, pamphlet, etc., containing any advertisement of any lottery shall be carried in the mail, or delivered by any postmaster or letter-carrier, and makes it a penal offence to deposit such newspaper or publication in the mails for the purpose of such transportation. Has Congress the power to make this an offence?

Mr. Maury's argument against the applications.

To determine this question we must look at the nature of the power. The test is laid down by Chief Justice Marshall: "Whenever the terms in which a power is granted to Congress, *or the nature of the power*, require that it should be exercised exclusively by Congress, the subject is as completely taken from the state legislatures, as if they had been expressly forbidden to act upon it." *Sturges* v. *Crowninshield*, 4 Wheat. 122, 193.

From the nature of this power, it is vested exclusively in Congress; for it belongs to a class, which, like the power to regulate commerce, to declare war, to establish a uniform rule of naturalization, and to establish uniform laws on the subject of bankruptcies, is as exclusively vested in the United States as if their exercise by the States had been forbidden. It follows, as a sequence of immense significance, that the States have denuded themselves of the power to prevent the introduction, by the mails, of things that endanger the morals or the health of their people.

Here, then, is an undoubted surrender by the States of a fragment of their police power; just as in *McCulloch* v. *Maryland*, 4 Wheat. 316, and *Brown* v. *Maryland*, 12 Wheat. 419, the States were held to have surrendered a fragment of the taxing power; and in *Leisy* v. *Hardin*, 135 U. S. 100, they were held to have lost a fragment of their police power.

It is equally clear that the police power which the States have thus surrendered has, by the Constitution, been devolved upon Congress. If it has not, then the Constitution has resulted in a failure of government in a vital particular, (and what graver necessity is there for the existence of a power, than the prevention of the failure of government?) or on the other hand, each State possesses a power within itself, which, by its very nature, should be uniform throughout all the States.

The assertion that power resides nowhere to prevent the transportation of such matter in the mails is somewhat appalling. The treaty making power has been assumed to be broad enough to exclude such matter from foreign mails: certainly the power to establish post-offices and post-roads should be equally broad as to the interstate mails.

Mr. Maury's argument against the applications.

There is a broad ground on which we may rest the implication that the Federal government has a police power over such subjects. No power in the Constitution can be exercised in such a way as to defeat any one or more of the five great purposes for which the Constitution was ordained, namely: (1) to form a more perfect union: (2) to establish justice: (3) to insure domestic tranquillity: (4) to provide for the common defence: (5) to promote the general welfare.

It is not contended that from each of these a substantive power can be evolved; but the whole instrument is subordinate to these leading objects. To establish a postal system without forbidding, under proper sanctions, its use for purposes hurtful to the morals of the people of the several States, would have been to endanger, instead of to promote, the general welfare. Not only so, it would have been to weaken the bonds of the Union, instead of making them more perfect, if Congress had not legislated in the way complained of. From this partial surrender of state police power, and the duty of Congress to promote the general welfare, it follows, by necessary implication, that Congress is clothed with all the police power over the mails that the several States would have had if the surrender had not been made.

This places Congress under an imperative duty to keep out of the mails everything that the representatives of the people in the several States, and of the States themselves, in Congress assembled, may properly exclude by a lawful use of police power. In *McCulloch's Case* the power implied to establish a bank was on the ground of convenience. Here, however, the power is absolutely necessary, to prevent a failure of government, the endangering of the general welfare and the weakening of the bonds of the Union itself. It is no exaggeration to say that such grave consequences would flow from permitting the lottery people of Louisiana to traffic in lottery tickets through public mails entering States where that traffic is prohibited as criminal.

We all know the disintegrating effect on the Union of the irritations growing out of slavery. Similar disintegrating forces would be the result of allowing the prostitution of the mails

Mr. Maury's argument against the applications.

to the Louisiana lottery. The people of the several States would be driven to exasperation by the impunity thus given to the lottery in defiance of their laws. With the mail at its service, the lottery could defy the police power of the States. Is there not, then, a direct connection between the law in question and the power "to establish post-offices and post-roads?" it being well established that what is necessarily implied in the Constitution is as much a part of it as what is expressed in it.

After what this court has said in *Phalen* v. *Virginia*, 8 How. 163, and in *Stone* v. *Mississippi*, 101 U. S. 814, there is no room for argument that if Congress has this police power over the mails, the exclusion of lotteries from them is within it. Louisiana has no more right to send the lottery infection in her newspapers through the mails than she has to send the yellow fever infection. The subject is a proper one to call into activity the police power of Congress.

The necessity for such a power has driven the other side to a concession which is a virtual surrender of the argument: that a lottery is not a *malum in se*, but that it is *malum quia prohibitum*, and that the police power of Congress is restricted to matters *mala in se*.

This gives up the case — not only because it cannot rest on such fanciful distinctions, but also because lotteries are clearly *mala in se*. *Phelan* v. *Virginia*, *ubi supra*.

Such an argument is an anachronism, even in Louisiana, whose legislature has from time to time denounced lotteries as crimes to be severely punished, making it "the duty of the presiding judge of every court of criminal jurisdiction in this State, especially to charge every grand jury to inquire into all violations of the laws against lotteries, and against the unlawful selling of tickets in lotteries." It is an anachronism, because it regards lotteries from the standpoint from which they were regarded when the Constitution was formed.

It is argued that nothing can be excluded from the mails by Congress that was not criminal *in se* when the Constitution was adopted. But this court trammels itself with no such restriction in determining the *bona fides* of an exercise of state police power. If the question in *Mugler* v. *Kansas*, 123 U. S.

623, had been raised at a much earlier day it might have been decided differently. How short a time it is since the abolitionist and the prohibitionist were looked upon as crackbrained zealots. Times and the opinions of men have undergone a radical change. Slavery is abolished, and society is now wrestling with the liquor traffic as one of the monster evils of the day. Now a State may prohibit the manufacture of liquor, and destroy the property of the manufacturer, and this court holds that, in such a case, the manufacturer has received no injury; that he cannot complain that his property has been taken without due process of law; that his damage cannot be redressed; that it is *damnum absque injuria.*

When the good faith of an exercise of the police power is assailed, this court does not go back to the formation of the Constitution for its standpoint.

To classify slavery and illicit liquor traffic now as mere *mala prohibita* would be absurd, as absurd as to contend that steamships cannot be used in the navy or that the mail must be transported overland on horseback or in a stagecoach. "There are few sources of crime," says this court in *Crowley* v. *Christiansen*, 137 U. S. 86, 91, "equal to the dram-shop, where intoxicating liquors, in small quantities, to be drunk at the time, are sold indiscriminately to all parties." No less condemnatory is its language about the lottery. "Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the widespread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor and it plunders the ignorant and simple." *Phalen* v. *Virginia*, 8 How. 163, 168.

It is admitted that there may be an evolution in crime, and that *malum prohibitum* may become *malum in se.* Polygamy was a great advance from incest and indiscriminate commerce; but polygamy is now a crime. So gladiatorial shows, murder of the aged and helpless in nomadic tribes, political assassination, piracy, and other things which were once esteemed virtues, have become, under changed conditions, vices of the

Mr. Maury's argument against the applications.

darkest dye. As this court says in *Mormon Church* v. *United States*, 136 U. S. 1, 49, "No doubt the Thugs of India imagined that their belief in the right of assassination was a religious belief; but their thinking so did not make it so. The practice of suttee by the Hindu widows may have sprung from a supposed religious conviction. The offering of human sacrifices by our own ancestors in Britain was no doubt sanctioned by an equally conscientious impulse. But no one, on that account, would hesitate to brand these practices, now, as crimes against society, and obnoxious to condemnation and punishment by the civil authority."

It is precisely because the conditions are changed that we say the lottery is *malum in se;* and of these changed conditions this court, as we have already seen, takes notice.

But, it is said, if lotteries can be thus excluded from the mails, Congress may exclude anything on the pretext that it is hurtful, and in that way break down a legitimate business. This is the old argument against a power, because it may be abused. This court is a sufficient protection against an abuse of state police power; and if Congress shall abuse its police power over the mails, this court will, in like manner, correct that abuse. It will neither suffer a State or Congress to invade guaranteed rights under the guise of exercising a police power. This court regards substance, not form.

But, it is said, the freedom of the press is assailed by this legislation.

Does the constitutional guaranty of freedom of the press override the duty of Congress to purge the mails? This guaranty, in common with all other provisions, is subordinate to the great leading purposes for which the Constitution was ordained: one of which is, the promotion of the general welfare, and another, "to form a more perfect union."

Again, whether this guaranty is paramount or not, the denial of the mails is no abridgment of the freedom of the press. All other channels are left open; channels of commerce, railroads and newspaper trains. Freedom of the press, like freedom of speech, and "the right to keep and bear arms," admits of and requires regulation, which is the law of liberty

that prevents these rights from running into license. Thus in some places newspapers are not to be hawked about the streets; in others they are not to be cried on Sunday. Nobody thinks that the freedom of the press, guaranteed by the Constitution, is interfered with by such regulations.

But it is said there is censorship in the prohibition to the postmaster to deliver. The prohibition only relates to newspapers containing lottery *advertisements*. It may be filled with other matter touching lotteries, and the prohibition will not apply. And further, the postmaster is not the channel of publication prescribed by law. He is responsible, under the law, if he abuses his power. We are not to assume that an officer, whose duty it is to withhold newspapers containing lottery advertisements, is going to violate the law and convert himself into a censor. No government would be practicable on that theory.

Shall Louisiana dominate the Union with this lottery? Power to prevent it must exist somewhere. It does exist in the United States, the government of all, with powers delegated by all, and representing all. *McCulloch* v. *Maryland*, 4 Wheat. 316, 405. "Power to determine such questions, so as to bind all, must exist somewhere, else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health or the public safety." *Mugler* v. *Kansas*, 123 U. S. 623, 660.

Mr. Chief Justice Fuller delivered the opinion of the court.

We are constrained by the circumstances in which we find ourselves placed by the illness and death of Mr. Justice Brad-

ley, to whom the preparation of the opinion in these cases was committed, to waive any elaboration of our views, and confine ourselves to the expression of the general grounds on which our decision proceeds.

These are applications for discharge by writ of *habeas corpus* from arrest for alleged violations of an act of Congress, approved September 19, 1890, entitled "An act to amend certain sections of the Revised Statutes relating to lotteries, and for other purposes." 26 Stat. 465, c. 908.

The question for determination relates to the constitutionality of section 3894 of the Revised Statutes as amended by that act. In *Ex parte Jackson*, 96 U. S. 727, it was held that the power vested in Congress to establish post-offices and post-roads embraced the regulation of the entire postal system of the country, and that under it Congress may designate what may be carried in the mail and what excluded; that in excluding various articles from the mails the object of Congress is not to interfere with the freedom of the press or with any other rights of the people, but to refuse the facilities for the distribution of matter deemed injurious by Congress to the public morals; and that the transportation in any other way of matters excluded from the mails would not be forbidden. Unless we are prepared to overrule that decision, it is decisive of the question before us.

It is argued that in Jackson's case it was not urged that Congress had no power to exclude lottery matter from the mails; but it is conceded that the point of want of power was passed upon in the opinion. This was necessarily so, for the real question was the existence of the power and not the defective exercise of it. And it is a mistake to suppose that the conclusion there expressed was not arrived at without deliberate consideration. It is insisted that the express powers of Congress are limited in their exercise to the objects for which they were entrusted, and that in order to justify Congress in exercising any incidental or implied powers to carry into effect its express authority, it must appear that there is some relation between the means employed and the legitimate end. This is true, but while the legitimate end of the exercise of the

power in question is to furnish mail facilities for the people of the United States, it is also true that mail facilities are not required to be furnished for every purpose.

The States before the Union was formed could establish post-offices and post-roads, and in doing so could bring into play the police power in the protection of their citizens from the use of the means so provided for purposes supposed to exert a demoralizing influence upon the people. When the power to establish post-offices and post-roads was surrendered to the Congress it was as a complete power, and the grant carried with it the right to exercise all the powers which made that power effective. It is not necessary that Congress should have the power to deal with crime or immorality within the States in order to maintain that it possesses the power to forbid the use of the mails in aid of the perpetration of crime or immorality.

The argument that there is a distinction between *mala prohibita* and *mala in se*, and that Congress might forbid the use of the mails in promotion of such acts as are universally regarded as *mala in se*, including all such crimes as murder, arson, burglary, etc., and the offence of circulating obscene books and papers, but cannot do so in respect of other matters which it might regard as criminal or immoral, but which it has no power itself to prohibit, involves a concession which is fatal to the contention of petitioners, since it would be for Congress to determine what are within and what without the rule; but we think there is no room for such a distinction here, and that it must be left to Congress in the exercise of a sound discretion to determine in what manner it will exercise the power it undoubtedly possesses.

We cannot regard the right to operate a lottery as a fundamental right infringed by the legislation in question; nor are we able to see that Congress can be held, in its enactment, to have abridged the freedom of the press. The circulation of newspapers is not prohibited, but the government declines itself to become an agent in the circulation of printed matter which it regards as injurious to the people. The freedom of communication is not abridged within the intent and meaning

of the constitutional provision unless Congress is absolutely destitute of any discretion as to what shall or shall not be carried in the mails, and compelled arbitrarily to assist in the dissemination of matters condemned by its judgment, through the governmental agencies which it controls. That power may be abused furnishes no ground for a denial of its existence, if government is to be maintained at all.

In short, we do not find sufficient grounds in the arguments of counsel, able and exhaustive as they have been, to induce us to change the views already expressed in the case to which we have referred. We adhere to the conclusion therein announced.

The writs of habeas corpus prayed for will therefore be denied, and the rules hereinbefore entered discharged.

BOYD v. NEBRASKA *ex rel.* THAYER.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 1208. Argued December 8, 1891. — Decided February 1, 1892.

Boyd was born in Ireland in 1834, of Irish parents. His father emigrated to the United States in 1844, with all his family, and settled in Ohio, in which State he has since resided continuously. In 1849 the father duly declared his intention to become a citizen of the United States, but there is no record or other written evidence that he ever completed his naturalization by taking out his naturalization certificate after the expiration of the five years. For many years after the expiration of that time, however, he exercised rights and claimed privileges in Ohio, which could only be claimed and exercised by citizens of the United States and of the State. The son, on attaining majority, voted in Ohio, under the belief that his father had become a citizen. In 1856 he removed to Nebraska, in which State he resided continuously until the commencement of this action. He voted there at all elections, held various offices there which required him to take an oath to support the Constitution of the United States, served in the army during the war, was a member of a convention to frame a state constitution, was mayor of Omaha and, after thirty years of unquestioned exercise of such rights and privileges, was elected governor of the State of Nebraska, receiving a greater number of votes than any other person voted for. He took the oath of office, and entered on the discharge of its duties. His predecessor, as relator, filed an information in the

Syllabus.

Supreme Court of Nebraska, in which were set forth the facts as to the declaration of intention by Boyd's father, and it was further averred that the father did not become a citizen during the son's minority, nor until the October term of the Court of Common Pleas in Muskingum County, Ohio, in the year 1890, when the son was 56 years of age, and it was claimed that Boyd, the son, never having himself been naturalized, was not, at the time of his election, a citizen of the United States, and was not, under the constitution and laws of Nebraska, eligible to the office of governor of that State, and the relator therefore prayed judgment that Boyd be ousted from that office, and that the relator be declared entitled to it until a successor could be elected. To this information the respondent, in his answer, after stating that his father, on March 5, 1849, when the respondent was about fourteen years of age, made before a court of the State of Ohio his declaration of intention to become a citizen of the United States, and averring "that his father for forty-two years last past has enjoyed and exercised all of the rights, immunities and privileges and discharged all the duties of a citizen of the United States and of the State of Ohio, and was in all respects and to all intents and purposes a citizen of the United States and of the State of Ohio," and particularly alleging his qualifications to be a citizen, and his acting as such for forty years, voting and holding office in that State, further distinctly alleged "on information and belief, that prior to October, 1854, his father did in fact complete his naturalization in strict accordance with the acts of Congress known as the naturalization laws so as to admit and constitute him a full citizen of the United States thereunder, he having exercised the rights of citizenship herein described, and at said time informed respondent that such was the fact." To this answer the relator interposed a demurrer, and on these pleadings the court below entered a judgment of ouster against Boyd, to which judgment a writ of error was sued out from this court. *Held*,

(1) That, as the defence relied on arose under an act of Congress and presented a question of Federal law, this court had jurisdiction to review it (FIELD, J., dissenting);

(2) That the fact that the respondent's father became a citizen of the United States was well pleaded, and was admitted by the demurrer;

(3) That upon this record Boyd had been for two years, next preceding his election to the office of governor, a citizen of the United States and of the State of Nebraska;

(4) That where no record of naturalization can be produced, evidence that a person having the requisite qualifications to become a citizen did in fact and for a long time vote, and hold office, and exercise rights belonging to citizens, is sufficient to warrant a jury in inferring that he has been duly naturalized as a citizen.

And it was further *Held*, by FULLER, C. J., and BLATCHFORD, LAMAR, and BREWER, JJ.:

(5) That, the Supreme Court having denied to Boyd a right or privilege

existing under the Constitution of the United States, this court had jurisdiction, on that ground also, to review the judgment of the Supreme Court of Nebraska;

(6) That, even if the father did not complete his naturalization before the son attained majority, the son did not lose the inchoate status which he had acquired through his father's declaration of intention to become a citizen, and that he occupied in Nebraska the same position which his father would have occupied had he emigrated to that State;

(7) That within the intent and meaning of the acts of Congress he was made a citizen of the United States and of the State of Nebraska under the organic and enabling acts of Congress, and the act admitting that State into the Union;

(8) That Congress has the power to effect a collective naturalization on the admission of a State into the Union, and did so in the case of Nebraska;

(9) That the admission of a State on an equal footing with the original States involves the adoption, as citizens of the United States, of those whom Congress makes members of the political community, and who are recognized as such in the formation of the new State with the assent of Congress;

(10) That the rule prescribed by § 4 of the act of April 14, 1802, 2 Stat. 155, c. 28, was to be a uniform rule, and there was no reason for limiting such a rule to the children of those who had been already naturalized, but, on the contrary, the intention was that the act of 1802 should have a prospective operation.

THE case was stated by the court as follows:

On the 13th of January, A.D. 1891, leave was granted to John M. Thayer, by the Supreme Court of the State of Nebraska, to file an information against James E. Boyd to establish the relator's right to the office of governor of that State, and to oust the respondent therefrom.

It appears from the record that the attorney general of the State refused to prosecute the action, and this is so stated in the information, which then alleges:

"1. On the Tuesday next succeeding the first Monday of November of the year 1888 he, the said John M. Thayer, was and for more than two years next preceding that time had been a citizen of the United States and of this State, and then had and now has all the qualifications required by law to hold the office of governor of the State of Nebraska.

"2. At the general election of this State, at the date afore-

said, for the election of governor and all state officers in accordance with the provision of the constitution and laws of this State, he was duly elected governor; that he duly qualified and entered upon the duties of said office on the first Thursday after the first Tuesday in January, 1889, and ever since then has exercised and now exercises the duties of said office.

"3. That his said election and oath of office as governor made it his duty to hold his office for the term of two years from the first Thursday after the first Tuesday in the January next after his election and until his successor should be elected and qualified.

"4. That there was held another general election of this State on the Tuesday next succeeding the first Monday of November in the year 1890 for the election of governor and other officers, and the returns of said election for the officers of the executive department were, as required by the constitution, sealed up and transmitted by the returning officers to the secretary of State, directed to the speaker of the house of representatives, who did, on the 8th day of January, 1891, immediately after the organization of the house and before proceeding to other business, open and publish the same in the presence of a majority of each house of the legislature, who were for that purpose assembled in the hall of the house of representatives.

"5. That said returns, so sealed up, transmitted, opened and published, showed that the whole number of votes cast at said general election for the several persons voted for for the office of governor aggregated 214,090; that of said number of votes so cast for governor James E. Boyd received 71,331, J. H. Powers received 70,187, L. D. Richards received 68,878, and there were scattering 3694; and James E. Boyd, being the person having the highest number of votes for the office of governor, was by said speaker declared duly elected governor for the term of two years from the first Thursday after the first Tuesday of January, 1891, and until his successor should be elected and qualified; and relator exhibits herewith and makes a part hereof a duly certified and authenticated copy of said returns.

"6. That thereupon the said James E. Boyd took the oath of

office required to be taken by the executive officers before they enter upon their official duties, and has usurped and invaded the office of governor of Nebraska, and has unlawfully attempted and now unlawfully attempts to hold the said office and perform the duties of governor of Nebraska, and will continue so to do unless ousted therefrom by the judgment of this honorable court.

"7. But the relator further gives the court to understand and be informed that the said James E. Boyd was not at the time of his said pretended election, on the said Tuesday next succeeding the first Monday of November, 1890, a citizen of the United States, and because he was not as aforesaid then a citizen of the United States he was not then eligible to the office of governor of this State, and as yet no person eligible thereto has been elected and qualified to succeed your informant, and it is the bounden duty of the relator to hold and continue in the office of governor until some person eligible thereto shall be elected and qualified as his successor; that in truth and in fact the said James E. Boyd was born in Ireland, of alien parents, in about the year 1834; that he was brought to this country when about ten years of age by his father, whose name was and is Joseph Boyd, who settled in about the year 1844 at Zanesville, Muskingum County, in the State of Ohio, where he has ever since resided and now resides; that the said Joseph Boyd, father of the said James Boyd, has never since he came to this country and settled at Zanesville, Ohio, resided at any other place.

"That on the fifth day of March, 1849, at, in and during the February (1849) term of the common pleas court of said Muskingum County, in the State of Ohio, the said Joseph Boyd, a native of Ireland and father as aforesaid of the said James E. Boyd, and when the said James E. Boyd was about fifteen years of age, in open court declared it to be his *bona fide* intention to become a citizen of the United States and to renounce and abjure forever all allegiance and fidelity to every foreign prince, potentate, state or sovereignty whatsoever, and particularly the Queen of Great Britain and Ireland; and the following is a true and full copy of the journal entry from the records

of the said common pleas court of the said Muskingum County, Ohio, showing such declaration of intention, to wit:

[Here follows the entry referred to.]

"And your informant has and exhibits to the court a duly certified transcript of the said record entry as found on page 187 of said journal, vol. 'T.'

"8. And relator further gives the court to understand and be informed that the said Joseph Boyd, father aforesaid of said James E. Boyd, never while the said James E. Boyd was under the age of twenty-one years applied to be admitted to become a citizen of the United States, and was never naturalized and never did become a citizen of the United States while the said James E. Boyd was under the age of twenty-one years; that at, in and during the October (1890) term of the said common pleas court, held within and for the county of Muskingum, in the State of Ohio, and never before and not until after the said James E. Boyd was upwards of twenty-one years of age, and not until he was of the age of fifty-six years, the said Joseph Boyd, father of the said James E. Boyd, a native of Ireland, and up to that time and then a subject of the Queen of Great Britain and Ireland, appeared in open court and made application to be admitted to become a citizen of the United States and proved to the satisfaction of the court that he declared his intention to become a citizen of the United States on the fifth day of March, 1849, before the court of common pleas of Muskingum County, Ohio, and also produced his certificate of such declaration of intention, and that he had resided within the limits of the United States five years then last past and for one year at least then last past within the State of Ohio, and that during that time he had behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same; and thereupon the said Joseph Boyd made solemn oath that he would support the Constitution of the United States, and that he did absolutely and entirely renounce and abjure all allegiance and fidelity to every foreign prince, potentate, state or sovereignty, and particularly to Great Britain and Ireland and the Queen of England, whose subject

he then was; and, the court being then satisfied that the said Joseph Boyd had complied with the laws of the United States relating to the naturalization of aliens, it was ordered that he be, and he then was, admitted to become a citizen of the United States, and a certificate was then issued to him; and before that time he had never been and was not a citizen of the United States; and the following is a copy of the journal entry from the records of the common pleas court of said Muskingum County, Ohio, showing such application of the said Joseph Boyd to be admitted to become a citizen and his admission to citizenship of the United States, to wit:

[Here follows the record referred to.]

"And the relator has and exhibits to the court a duly certified transcript of the said record entry as found on page 145 of said journal, volume 42.

"9. And the relator further shows that careful and diligent search has been made by the clerk of the court of common pleas of said Muskingum County, Ohio, through all the records of his said office, and that the only record or journal entry in any shape or form in said court and in the records thereof of or concerning the declaration of intention to become and application of the said Joseph Boyd to be admitted a citizen of the United States in said office is found upon page 187 of Journal 'T' and upon page 145 of Journal 42, and the only record or journal entries in said office of the naturalization of said Joseph Boyd is found upon said page 145 of said Journal No. 42, and that said two entries constitute the only and entire record of the naturalization of said Joseph Boyd, as shown by the records and journals of said court; and the relator exhibits and shows to the court the certificate of the clerk of said court, duly signed and made under oath, showing such facts.

"10. And the relator further shows that the said James E. Boyd has never at any time declared his intention to become a citizen of the United States, nor has he ever made application to be admitted as a citizen of the United States, but he has ever remained an alien and a subject to the Queen of Great Britain and Ireland.

"And relator says by reason of the premises and by reason

of the legal disqualification of the said James E. Boyd to hold said office of governor the said election for governor was and is null and void.

"11. And the relator further shows that, notwithstanding the fact that the said James E. Boyd was and is ineligible to the office of governor as aforesaid, and notwithstanding the fact the relator is bound to continue in and hold the office of governor and is entitled to the peaceable and undisturbed possession of the office of governor and the furniture and records thereof, yet the said James E. Boyd has usurped and invaded the office of governor of Nebraska unlawfully and has unlawfully undertaken to perform the duties of said office; and the relator has refused and refuses for the reason hereinbefore stated to surrender said office to said defendant and will not do so unless required so to do by the judgment of this honorable court, upon due hearing had.

"Wherefore the said John M. Thayer prays judgment that the defendant, James E. Boyd, be declared not entitled to said office, and that he be ousted therefrom, and that he, the said John M. Thayer, be declared entitled to such office until such time as some person eligible thereto shall be elected and qualified as his successor, and that the said James E. Boyd be enjoined from invading the said office and from interfering in any manner with the furniture, records or anything therein or pertaining thereto, or in any manner interfering or intermeddling with the relator in the performance of the duties of governor of Nebraska."

The respondent, on the 16th of February, 1891, filed his motion to dismiss the cause for that the relator had no right, title or authority in law to institute or maintain the action; that the petition did not state grounds sufficient to constitute a cause of action; that the petition showed on its face that respondent was the duly elected, qualified and acting *de jure* governor of the State, and entitled in law to hold that office and bound to discharge the duties thereof for and during the term of two years from and after January 8, 1891. This motion was overruled, and the respondent was ruled to answer, which he did as follows:

Statement of the Case.

"Now comes the respondent, James E. Boyd, and admits that the attorney general of this State refuses to prosecute this action, and protests and insists and avers the fact to be that the information herein is insufficient in law to require the respondent to make answer thereto, for that it does not show that said John M. Thayer has any right or title to the said office of governor of Nebraska, or that he has any right, title or authority to institute, maintain or prosecute this action, and for that said information does not state facts sufficient to constitute a cause of action.

"Further answering, respondent admits the allegations of the first, second, third, fourth and fifth paragraphs of the information, except as hereinafter shown. Further answering, said respondent shows to the court that said John M. Thayer was, at the regular state election held in the State of Nebraska in November, A.D. 1888, elected to the office of governor of this State for a term thereof commencing in January, 1889, and that upon the canvass of the votes cast at said election he was duly declared to be so elected; that the term of said office is fixed by the constitution to commence on the first Thursday after the first Tuesday in January succeeding the election and continues for a period of two years and until his successor shall be elected and qualified; and the respondent further says that the laws of Nebraska at all the times herein mentioned provided that if a qualified incumbent of the office holds over by reason of the non-election or non-appointment of his successor he shall qualify within ten (10) days from the time at which his successor, if elected, should have qualified, by taking the oath of office, and executing and having approved and filed for record his official bond in the sum of fifty thousand ($50,000.00) dollars, conditioned for the faithful performance of the duties of the office, as by law required.

"Respondent further says that the said John M. Thayer continued as the actual incumbent of said office down to the time when this respondent qualified as governor of this State, on the 8th day of January, 1891, which was the first Thursday after the first Tuesday in January succeeding the election in question. Respondent further says that the said John M.

Thayer has never since the 8th day of January, 1891, qualified anew as governor of the State of Nebraska; that he has not since that date taken or filed the official oath required by law, nor has he had his official bond executed or approved or filed for record, as by law required, to qualify him anew if no party was elected to hold said office of governor from and after the said 8th day of January, as he alleges in his information, but which respondent denies; and in this behalf further alleges the fact to be that after the said 8th day of January, 1891, the respondent entered into the office of governor of the State of Nebraska, and the said John M. Thayer from that time and thereafter wholly surrendered, abandoned and removed from said office, and has not since in any manner, directly or indirectly, occupied or possessed the same or assumed or pretended to assume to perform any of the functions thereof, but wholly surrendered the same and vacated said office.

"Answering the sixth paragraph of said information the respondent admits that after his election to the said office and the canvass of the returns, and after he had been declared elected to the said office by the speaker of the house of representatives in the presence of a majority of the legislature, as required by law, he on the 8th of January, 1891, took the oath of office, executed and filed his official bond, did all other acts and things required by law of him to be done, to qualify and entitle him to enter into the possession, use and enjoyment of said office and to discharge the duties thereof, and the respondent denies that he has usurped or invaded the said office or unlawfully attempted at any time to hold said office and to perform the duties thereof, but avers the fact to be that at and from the commencement of the term of his said office, from January 8th, 1891, he has been and now is the duly elected and qualified governor of the State of Nebraska, in the quiet, legal and actual possession and enjoyment of said office and discharging its duties; that he has been recognized so to be by all of the departments and officers of the state government.

"And the respondent further avers the fact to be that the said John M. Thayer ceased to be the incumbent of said office in law and in fact with the expiration of the 8th day of Janu-

ary, A.D. 1891, and prior to the commencement of this action.

"Answering the eighth paragraph of said information, the respondent denies all the allegations thereof except that he was born in Ireland, of alien parents, in the year 1834; that he was brought to this country, when about ten years of age, by his father, Joseph Boyd, who settled about the year 1844 in Belmont County, Ohio, where he resided for several years, and thereafter removed to Zanesville, Muskingum County, Ohio, where he has ever since resided.

"Respondent also admits that his father, on or about March 5, 1849, when respondent was about 14 years of age, declared his intention to become a citizen of the United States and to renounce and abjure forever all allegiance and fidelity to every foreign prince, potentate, state and sovereignty whatever, and particularly the Queen of Great Britain and Ireland, and that the alleged exemplification of the record thereof copied in said information respondent believes is a true copy.

"Answering the 8th paragraph of said information, respondent says he admits the facts therein alleged, except as in this answer otherwise averred, but denies the conclusions of law and facts therein stated.

"Respondent further avers that his father for forty-two years last past has enjoyed and exercised all of the rights, immunities and privileges and discharged all the duties of a citizen of the United States and of the State of Ohio and was in all respects and to all intents and purposes a citizen of the United States and of the State of Ohio, at all times disclaiming and abjuring allegiance to every foreign prince, potentate, state or sovereignty; that during all of said times said Joseph Boyd behaved as a man of good moral character, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same; that when the said Joseph Boyd settled in the State of Ohio as aforesaid it was his *bona fide* intention to make the United States his permanent residence; that at that time he did in fact disclaim and abjure all allegiance and fidelity to the Queen of Great Britain and Ireland and to every other foreign prince, potentate, state and sovereignty, and for about 40 years acted

in the belief that he was a citizen of the United States, at all said times exercising the elective franchise without question or challenge, voting for all officers of the State and Federal governments the same as a native-born citizen of the United States and of the State of Ohio.

"Respondent further says that about the year 1870 said Joseph Boyd was elected to the office of justice of the peace in said Muskingum County, Ohio, and thereupon took an oath to support the Constitutions of the United States and of the State of Ohio, and for several years held said office, exercising all the rights, franchises, powers and duties of said office, and has for years last past held office under the constitution and laws of Ohio, to wit, weighmaster in the city of Zanesville, which office he now holds.

"Respondent further says that he was informed by his father as early as the year 1855 that he, the said Joseph Boyd, was a citizen of the United States and entitled, in law and in fact, to all the rights, privileges and immunities of a citizen of the United States and of the State of Ohio, and that ever since said time this respondent has so believed and accepted the fact so to be, and never heard the fact challenged or questioned till after he was elected to the office of governor of this State, in 1890. Respondent further says that he did, upon arriving at the age of 21 years, exercise the elective franchise in said Muskingum County, Ohio, in the fall of 1855.

"The respondent further alleges, on information and belief, that prior to October, 1854, his father did in fact complete his naturalization in strict accordance with the acts of Congress known as the naturalization laws so as to admit and constitute him a full citizen of the United States thereunder, he having exercised the rights of citizenship herein described, and at said time informed respondent that such was the fact; that when his father applied to be registered in Ohio in October, 1890, under a new law, he was required to produce his citizenship papers, and being unable to find all thereof, he appeared before said court of common pleas of Muskingum County, at the October term thereof, 1890, and the proceedings described in the 9th paragraph of the information were had as therein set

out, but respondent avers the fact to be, on information and belief, that in the matter of said proceedings said Joseph Boyd acted inadvisedly and ignorantly, the said last named proceedings being in that event unnecessary.

"Respondent further says that in the year 1856, at the age of 22, he left his father's home in Ohio in the firm belief that he, respondent, was a citizen of the United States in law and in fact, to establish himself in life; that he went to the State of Iowa, where he resided for a few months.

"In the month of August, 1856, respondent removed to the Territory of Nebraska, which was then to a large extent a wilderness, and settled in Douglas County, where he resided for two years, working at his trade as a carpenter, and in 1857 he was elected county clerk of said county, and took an oath to support the Constitution of the United States and the provisions of the organic act under which the Territory of Nebraska was created. Respondent removed to what is now Buffalo County, near old Fort Kearney, which was then upon the extreme frontier, in the fall of 1858, where he engaged in the business of farming, in the midst of great perils from hostile Indians, suffering years of extreme hardship. In 1864, at the time of the Indian outbreak in said vicinity, when the lives and property of settlers were destroyed or endangered, when many settlers were massacred, when hostile Indians killed cattle before the door of the home of his family, he volunteered his services as a soldier of the United States, which were accepted by the United States government, he being sworn into its military service by order of General R. B. Mitchell; that he served as a soldier of the United States, without compensation or reward, to protect the men, women and children of the frontier and to maintain the authority, honor and flag of the United States government.

"In the year 1866 respondent was elected a member of the house of representatives of Nebraska to represent the counties of Buffalo and Hall; that he served as such officer in the following session of the legislature, to which was submitted the proposition of the Congress of the United States to accept the first constitution of this State with the conditions imposed

by the act of Congress known as the enabling act, below named; that before entering upon the duties of said office he took the oath required by law and swore to support the Constitution of the United States and the provisions of the organic act under which the Territory of Nebraska was created.

"In 1868 respondent removed to Douglas County, where he has since resided. In the year 1871 respondent was elected by the electors of said county a member of the convention of the people of the State of Nebraska to form a state constitution, and, after taking the oath required by law to support the Constitutions of the United States and State of Nebraska, in fact served as a member of said convention.

"In the year 1875 the respondent was elected by the electors of said county a member of the convention of the people of the State of Nebraska to form a constitution, which convention discharged that duty in the year 1875, which resulted in forming the constitution under which the government of this State has since existed. Respondent, after taking the oath required by law to support the Constitutions of the United States and of this State, in fact served as a member of said convention.

"In 1880 respondent was elected and acted as president of the city council of the city of Omaha.

"In 1881 respondent was elected mayor of the city of Omaha, and served in said office for two years. In 1885 respondent was again elected to said office of mayor, and served for two years, and before taking the office of mayor each of said times respondent took an oath to support the Constitutions of the United States and of the State of Nebraska.

"Respondent further says that during said period of over 30 years he has exercised the elective franchise in said Territory and State of Nebraska and enjoyed all the rights, privileges and immunities of a citizen of the United States and of said Territory and State.

"Respondent further says that for over 32 years last past he has been in fact and in law a citizen of the United States and of said Territory and State; that neither the United States nor the Territory or State of Nebraska has ever challenged his

citizenship or sought to oust him of the franchise actually enjoyed and exercised by him to be a citizen of the United States, and that it is not competent for this relator so to do; that if his said right and privilege of being a citizen of the United States is subject to challenge, it is solely for the United States in its sovereign capacity to challenge the same.

"And he further avers that he was at the time of the election in question and for more than two years prior thereto eligible to be elected to and to hold said office of governor for the term in question.

"Respondent further says that in 1849 it was his *bona fide* intention to be a citizen of the United States, and that he then renounced and abjured forever all allegiance and fidelity to every foreign prince, potentate, state or sovereignty whatever, and particularly the Queen of Great Britain and Ireland; that during all the time since he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same, and all said time has absolutely renounced and abjured all allegiance and fidelity to every foreign prince, potentate, state or sovereignty, and particularly the Queen of Great Britain and Ireland.

"Further answering, respondent shows to the court that after his said election as governor and after he had learned for the first time that his citizenship had been questioned, and on December 16th, 1890, he went before the District Court of the United States for the District of Nebraska for the purpose of removing all doubts that might arise thereafter in respect thereof, and by petition to said court represented to that court the facts necessary to be known in that behalf touching his said history and citizenship of the United States, insisting therein that he was and had been for more than two years next preceding his election to the office of governor in November, 1890, a citizen of the United States, and also representing to said court that a question had been raised as to his citizenship; whereupon said court, by its judgment, found, determined and adjudged that he was in fact and law a full citizen of the United States; and respondent avers that he is

and for many years last past has been a citizen of the United States within the meaning and requirements of the acts of Congress of the United States, a copy of which petition, judgment and record is hereto attached and made part of this answer.

"Respondent denies the allegations of the 9th, 10th and 11th paragraphs of said information, except that he refuses to surrender said office of governor to the said relator, and all other allegations of said information not hereinbefore admitted or specially answered.

"Wherefore respondent prays to be hence dismissed with his costs in this behalf most wrongfully expended, and for such other and further relief as may be just and proper."

Attached to the answer was a duly certified copy of the proceedings of the United States District Court therein referred to.

To this answer the relator demurred, and assigned as grounds of demurrer that the answer did not state facts sufficient to constitute a defence; that the facts stated were insufficient to justify the respondent in holding and exercising the office of governor; that the answer showed on its face that the respondent was an alien and ineligible to the office of governor of Nebraska in November, 1890, at the time of his pretended election; that the answer admitted the facts pleaded in the information, showing the right of the relator to hold the office of governor; that the exhibits filed by the respondent showed him not to have been a citizen of the United States prior to December, 1890; wherefore relator prayed judgment of the court upon the pleadings that the respondent be ousted from said office of governor of Nebraska, and that relator be reinstated therein.

On the 12th of March, 1891, the cause was heard upon the demurrer, and on the 5th of May of that year the court announced its opinion, (two of the three judges concurring and one dissenting,) and entered judgment of ouster as against respondent and reinstating the relator in said office. On the same day a writ was issued in accordance with said judgment, and the relator put into possession of said office in place

of the respondent. The opinions will be found reported, in advance of the official series, in 48 N. W. Rep. 739. A writ of error was thereupon sued out from this court.

Mr. James C. Cowin, *Mr. Henry D. Estabrook* and *Mr. A. H. Garland* for plaintiff in error.

Mr. John F. Dillon and *Mr. John L. Webster* (with whom was *Mr. Joseph H. Blair* on the brief) for defendant in error.

James E. Boyd, the plaintiff in error, had not been for two years next preceding his election a citizen of the United States, and hence under the Constitution of the State he was not eligible to the office of governor. He was not a citizen of the United States even at the date of the election. He was fifty-six years of age at the date of the naturalization of his father. Personally, he never made any application to be naturalized as a citizen of the United States until the 16th day of December, 1890, which was after the date of the election at which a plurality of votes was cast for him for the office of governor of the State of Nebraska.

I. He cannot claim to have become a citizen of the United States under the provisions of Section 2172 of the Revised Statutes of the United States, for the reason that he was not under twenty-one years of age at the date of the naturalization of his father. To bring him within the provisions of that section (which is the act of April 14, 1802) he must have been "under the age of twenty-one years at the time of the naturalization of his father." *Campbell* v. *Gordon*, 6 Cranch, 176; *Gumm* v. *Hubbard*, 97 Missouri, 311; *State* v. *Penney*, 10 Arkansas, 621; *O'Connor* v. *The State*, 9 Florida, 215; *United States* v. *Kellar*, 13 Fed. Rep. 82.

II. The facts pleaded in the answer to the effect that James E. Boyd had exercised the elective franchise in Nebraska for a great many years and that he had held office as a member of the legislature, as a member of the constitutional convention and as mayor of the city of Omaha did not make him a citizen of the United States.

It may be true that James E. Boyd believed himself during all those years to have been a citizen of the United States, but that is immaterial. Aliens can only become American citizens through the process of naturalization. It will not do to permit the argument to prevail, that he should be adjudged to be a citizen of the United States, simply because the people of Nebraska, through ignorance of his alienage, permitted him to vote and hold office.

The case of *Dryden* v. *Swinburne*, 20 West Va. 89, is on all fours with this case. In that case section 2172 of the Revised Statutes was construed, and it was held that a naturalization order cannot be made retroactive; that naturalization cannot be presumed from taking a conveyance of land, voting and exercising other rights of citizenship; that an order admitting to citizenship rebuts the presumption of any previous naturalization; that parol evidence was not competent to prove the fact of naturalization; that section 2172, Rev. Stat. was but the act of 1802 continued in force, and that it was not the purpose of Congress by that section to modify or change the law as expressed in the old statute; and that the word "now" as used in the Revised Statutes has reference to the year 1802, when these provisions first became law.

This question has been twice before the legislative department of the government.

Albert Gallatin was born in Switzerland in 1761, and came to the United States in 1780. In the year 1783 he went to Virginia, and in the month of October, 1785, he took the oath of allegiance in that State. In December, 1785, he removed to Pennsylvania, where he purchased land and became a permanent resident. He was elected in 1789 a member of the convention which was called to amend the constitution of the State of Pennsylvania, and subsequently he was for three successive years elected a member of the Pennsylvania legislature. In February, 1793, he was elected a senator from Pennsylvania, and he came to the Senate and took his seat in the December following.

It appears that from the time he took his oath of allegiance in Virginia, in 1785, to the period of his election as senator,

in 1793, he had not been a citizen of the United States for the time required by the Constitution, which is nine years.

The committee appointed to investigate the case made their report to the Senate, setting forth the foregoing fact. Upon the coming in of the report of the committee, a resolution was offered in these words:

"*Resolved*, That Albert Gallatin, returned to this House as a member from the State of Pennsylvania, is duly qualified for and elected to a seat in the Senate of the United States." This resolution was rejected by a vote of fourteen nays to twelve yeas. The record then proceeds as follows:

"A resolution was then offered in these words:

"*Resolved*, That the *election* of Albert Gallatin to be a senator of the United States was *void*, he not having been a citizen of the United States the term of years required as a qualification to be a senator of the United States.

"A motion was made to divide the question at the word *void;* and

"On motion to agree to the first paragraph on the motion so divided, it passed in the affirmative: Yeas 14, nays 12.

"On motion to adopt the resolution, as follows:

"*Resolved*, That the *election* of Albert Gallatin to be a senator of the United States *was void*, he not having been a citizen of the United States the term of years required as a qualification to be a senator of the United States.

"The vote was: ayes 14, noes 12; and so the resolution was carried."

General Shields was elected a United States senator from the State of Illinois on the 13th day of January, 1849. He was an alien by birth. He was naturalized in the Circuit Court of Effingham County on the 21st of October, 1840. He took his seat as United States senator on the 4th of March, 1849, when his seat was contested upon the ground that he had not been a citizen of the United States the term of nine years required as a qualification to be a senator of the United States. He had resided in the State of Illinois seventeen years. He had held a number of public offices. He had been a member of the legislature, which required naturalization.

He had held the office of Auditor of Public Accounts, which required naturalization. He had been a Judge of the Supreme Court of Illinois, which required naturalization. He had been Commissioner of the General Land Office. He had been a General in the United States army, and lastly had been elected United States senator.

The question of his eligibility was referred to a committee which, on the 13th of March, 1849, reported, and the Senate, after a short discussion, resolved "that the election of James Shields to be a senator of the United States was void, he not having been a citizen of the United States the term of years required as a qualification to be a senator of the United States at the commencement of the term for which he was elected."

III. The fact that Boyd was an inhabitant of the Territory of Nebraska at the time when Nebraska was admitted into the Union as a State did not have the effect of making him (he then being an alien) a citizen of the United States.

The question for consideration is whether the admission of Nebraska as a State into the Union, on an equal footing with the original States, as provided in the enabling act and the act of 1867, made all inhabitants thereof including aliens *ipso facto* citizens of the United States.

Similar or the same language is found in the enabling acts by which the various Territories were authorized to form state governments in order to be admitted into the Union of States.

It will be observed by an examination of the enabling act of Nebraska, as also of various other enabling acts, that it contains no provision touching the rights, privileges and immunities of the inhabitants, upon the State coming into the Union. The silence of the enabling acts on this subject is here very important. The inhabitants of these Territories were living within the jurisdiction of the United States, were subject to the jurisdiction of the United States, and were already citizens of the United States except such as were aliens. Those inhabitants who were citizens of the United States were none the less citizens by reason of the fact that they were inhabitants of the Territories.

Citizens of the United States do not lose their citizenship by

changing their residence from a State to a Territory. Citizens of the United States residing in the District of Columbia and in the Territories are such citizens to the same extent that they would be if residing in one of the States. *Prentiss* v. *Brennan*, 2 Blatchford, 162; *Picquet* v. *Swan*, 5 Mason, 35.

It would not be unfair to state that about as large a relative proportion of the inhabitants of the Territory were citizens of the United States as of the inhabitants of any of the States of the Union. There was no occasion, therefore, for Congress to intend the admission of the State into the Union as an act of collective naturalization. There was no more urgency or necessity for such a collective act of naturalization for this Territory than there would be to pass a collective act of naturalization for aliens residing within a State. If Congress had ever intended the admission of States into the Union formed under the various enabling acts to operate as a naturalization of all aliens residing therein, it would doubtless have been so provided in the act itself, in unmistakable terms.

The language of the enabling act has no reference to the status of the inhabitants of the original States when they came into the Union, any more than it can be said to have reference to the footing or relative rights of the original States at the time when they formed the Union of States. Indeed, it is self-evident that no Territory can now be admitted into the Union as a State with all the rights and privileges which were possessed by the original States when they came into the Union.

The view which we have expressed to the effect that the inhabitants of the Territory did not become citizens of the United States by the admission of such Territory as a State into the Union, is expressly held to be sound in *The State* v. *Primrose*, 3 Alabama, 546. This case is referred to in the opinion of the Supreme Court of Nebraska. We are aware of two earlier cases in Louisiana which seem to announce a contrary view, but we cannot accept them as applicable as the circumstances and legislative provisions were essentially different.

The third section of the Treaty of Paris of 1803 speaks solely of the "inhabitants" of the ceded Territory. It says

the "'inhabitants' shall be incorporated, . . . and admitted as soon as possible . . . to the enjoyment of all the rights, advantages and immunities of citizens of the United States, and in the meantime," etc. Neither the circumstances nor the language make the case analogous or similar to the Nebraska case.

The Nebraska enabling act empowers only the inhabitants who are qualified voters, free, white male inhabitants above the age of twenty-one years, who are already citizens of the United States, or have declared their intention to become such, to prepare a constitution; and provides that this constitution shall be preliminary to the admission of the State into the Union, not preliminary to the admission of the inhabitants to citizenship of the United States.

The closing paragraph of section 5 of the enabling act, referring to the former language of the same section, which relates to the adoption or rejection of the constitution by the qualified voters, which closing paragraph assumes that the constitution has been adopted, says: "Whereupon it shall be the duty of the President of the United States to issue his proclamation declaring the State admitted into the Union on an equal footing with the original States;" *i. e.* the new State from that time stands in line with every other State in the Union, with all the privileges and under all the burdens of a state government. No mention is made of the inhabitants; no statement is made that the inhabitants are admitted to citizenship as in the treaty of Paris. No foreigners or aliens are adopted, nor are any made citizens of the United States.

All the inhabitants of the Territory who were aliens when the same was made a State remained aliens, and no privileges were accorded them which they would not have enjoyed before had they removed from the Territory to a State already admitted. The distinction made in the constitution and the legislation of that State between citizens and aliens is at war with the suggestion that all the inhabitants of Nebraska were citizens of Nebraska and made *ipso facto* citizens of the United States by the admission of the State into the Union. How can such legislation be harmonized with the argument that all

inhabitants were citizens? If all inhabitants were citizens, why was there a provision in the Constitution and in the statutes providing that aliens should file their declaration of intention to become citizens of the United States before they were entitled either to vote or to hold office? To say that the aliens inhabiting the Territory when the State was admitted into the Union were thereby made citizens of the United States is in conflict with the political history of this country from the time the first State was admitted into the Union down to the present day.

The Organic Act, the enabling act, the act admitting the State, are each and all simple legislative exertions of the powers of Congress, and in no correct sense treaties or the exercise of the treaty-making power. For the reasons hereinbefore stated we submit in conclusion of this part of the discussion, that there is no analogy between the case of the acquisition by treaty of foreign territory and the status of the inhabitants of the Territory so acquired and the case of the national ownership of the public domain and the status of the people residing therein with the consent of the national government, which first erects a territorial government and subsequently makes provision to admit the Territory thus erected as a State of the Union.

Mr. Chief Justice Fuller delivered the opinion of the court.

(1) In *State of Nebraska ex rel. Glenn* v. *Stein*, 13 Nebraska, 529, it was held that where the State at large was interested in a proceeding in *quo warranto*, the attorney general was, as at common law, the proper person to institute it, but when the information was filed by an individual to oust the incumbent from an office and install the relator therein, it was a personal remedy on behalf of the individual claiming to be aggrieved, and the State was but a nominal party.

In the case at bar the attorney general refused to file the information, and the relator obtained leave to prosecute it in the name of the State, but on his own behalf, as under the statute he was authorized to do. Compiled Stat. Neb. 1891, c. 71, p. 626; Code Civ. Proced. Tit. 23, p. 954.

By section 2 of article V of the constitution of the State of Nebraska, in force November 1, 1875, it was provided: "No person shall be eligible to the office of governor, or lieutenant governor, who shall not have attained the age of thirty years, and been for two years next preceding his election a citizen of the United States and of this State. None of the officers of the executive department shall be eligible to any other State office during the period for which they have been elected." Comp. Stat. Neb. 1891, p. 26.

In *United States* v. *Cruikshank*, 92 U. S. 542, 549, Mr. Chief Justice Waite, delivering the opinion of the court, said: "Citizens are the members of the political community to which they belong. They are the people who compose the community, and who, in their associated capacity, have established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual as well as their collective rights." There is no attempt in this definition, which was entirely sufficient for the argument, to exclude those members of the State who are citizens in the sense of participation in civil rights, though not in the exercise of political functions.

The Constitution provides that no person shall be a representative who has not been "seven years a citizen of the United States," (Art. I, sec. 2, par. 2;) that no person shall be a senator who has not been "nine years a citizen of the United States," (Art. I, sec. 3, par. 3;) that no person shall be eligible to the office of President of the United States "except a natural-born citizen, or a citizen of the United States, at the time of the adoption of this Constitution," (Art. II, sec. 1, par. 4;) and that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," (Art. IV, sec. 2, par. 1.) And Congress is empowered "to establish an uniform rule of naturalization," (Art. I, sec. 8, par. 4.) But prior to the adoption of the Fourteenth Amendment there was no definition of citizenship of the United States in the instrument.

Mr. Justice Story, in his Commentaries on the Constitution, says: "Every citizen of a State is *ipso facto* a citizen of the

United States." (Sec. 1693.) And this is the view expressed by Mr. Rawle in his work on the Constitution. (c. 9, pp. 85, 86.) Mr. Justice Curtis, in *Dred Scott* v. *Sandford*, 19 How. 393, 576, expressed the opinion that under the Constitution of the United States "every free person born on the soil of a State, who is a citizen of that State by force of its constitution or laws, is also a citizen of the United States." And Mr. Justice Swayne, in *The Slaughter-House Cases*, 16 Wall. 36, 126, declared that "a citizen of a State is *ipso facto* a citizen of the United States." But in *Dred Scott* v. *Sandford*, 19 How. 393, 404, Mr. Chief Justice Taney, delivering the opinion of the court, said: "The words 'people of the United States' and 'citizens' are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the government through their representatives. They are what we familiarly call the 'sovereign people' and every citizen is one of this people, and a constituent member of this sovereignty. . . . In discussing this question, we must not confound the rights of citizenship which a State may confer within its own limits, and the rights of citizenship as a member of the Union. It does not by any means follow, because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States. He may have all of the rights and privileges of the citizen of a State, and yet not be entitled to the rights and privileges of a citizen in any other State. For, previous to the adoption of the Constitution of the United States, every State had the undoubted right to confer on whomsoever it pleased the character of citizen, and to endow him with all its rights. But this character of course was confined to the boundaries of the State, and gave him no rights or privileges in other States beyond those secured to him by the laws of nations and the comity of States. Nor have the several States surrendered the power of conferring these rights and privileges by adopting the Constitution of the United States. Each State may still confer them upon an alien, or any one it thinks proper, or upon any class or description of persons; yet he would not be a citizen in the sense in

which that word is used in the Constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other States. The rights which he would acquire would be restricted to the State which gave them. The Constitution has conferred on Congress the right to establish an uniform rule of naturalization, and this right is evidently exclusive, and has always been held by this court to be so. Consequently, no State, since the adoption of the Constitution, can by naturalizing an alien invest him with the rights and privileges secured to a citizen of a State under the Federal government, although, so far as the State alone was concerned, he would undoubtedly be entitled to the rights of a citizen, and clothed with all the rights and immunities which the constitution and laws of the State attached to that character."

The Fourteenth Amendment reads: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In *The Slaughter-House Cases*, 16 Wall. 36, it was held by this court that the first clause of the fourteenth article was primarily intended to confer citizenship on the negro race, and secondly to give definitions of citizenship of the United States, and citizenship of the States, and it recognized the distinction between citizenship of a State and citizenship of the United States by those definitions; that the privileges and immunities of citizens of the States embrace generally those fundamental civil rights for the security and establishment of which organized society was instituted, and which remain, with certain exceptions mentioned in the Federal Constitution, under the care of the State governments; while the privileges and immunities of citizens of the United States are those which arise out of the nature and essential character of the national

government, the provisions of its Constitution, or its laws and treaties made in pursuance thereof; and that it is the latter which are placed under the protection of Congress by the second clause of the Fourteenth Amendment.

In *Gassies* v. *Ballon*, 6 Pet. 761, 762, Mr. Chief Justice Marshall declared that "a citizen of the United States, residing in any State of the Union, is a citizen of that State;" and the Fourteenth Amendment embodies that view.

The Supreme Court of Nebraska decided that James E. Boyd had not been for two years next preceding his election a citizen of the United States, and hence that under the constitution of the State he was not eligible to the office of governor; and that he was not a citizen of the United States, because during his entire residence in the Territory from 1856 to 1867, and in the State from 1867 to November 4, 1890, the date upon which he was elected governor, he was a subject of Great Britain and Ireland.

Arrival at this conclusion involved the denial of a right or privilege under the Constitution and laws of the United States, upon which the determination of whether Boyd was a citizen of the United States or not depended, and jurisdiction to review a decision against such right or privilege necessarily exists in this tribunal. *Missouri* v. *Andriano*, 138 U. S. 496. Each State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen, and the title to offices shall be tried, whether in the judicial courts or otherwise. But when the trial is in the courts, it is "a case," and if a defence is interposed under the Constitution or laws of the United States, and is overruled, then, as in any other case decided by the highest court of the State, this court has jurisdiction by writ of error.

We do not understand the contention to involve, directly, a denial of the right of expatriation, which the political departments of this government have always united in asserting, (Lawrence's Wheaton, 925; Whart. Confl. Laws, § 5; 8 Op. Att'y Gen. 139; 9 Op. Att'y Gen. 356; Act of Congress of July 27, 1868, 15 Stat. 223, c. 249; Rev. Stat. § 1999,) but that it is insisted that Boyd was an alien upon the ground that the

disabilities of alienage had never been removed, because he had never been naturalized.

Naturalization is the act of adopting a foreigner, and clothing him with the privileges of a native citizen, and relator's position is that such adoption has neither been sought nor obtained by respondent under the acts of Congress in that behalf.

Congress in the exercise of the power to establish an uniform rule of naturalization has enacted general laws under which individuals may be naturalized, but the instances of collective naturalization by treaty or by statute are numerous.

Thus, although Indians are not members of the political sovereignty, many classes of them have been made citizens in that way. *Elk* v. *Wilkins*, 112 U. S. 94. By the treaty of September 27, 1830, provision was made for such heads of families of the Choctaws as desired it, to remain and become citizens of the United States. 7 Stat. 335. By the treaty of December 29, 1835, such individuals and families of the Cherokees as were averse to a removal west of the Mississippi and desirous to become citizens of the States where they resided were allowed to do so. Ibid. 483. By the act of Congress of March 3, 1843, it was provided that on the completion of certain arrangements for the partition of the lands of the tribe among its members, "the said Stockbridge tribe of Indians, and each and every of them, shall then be deemed to be, and from that time forth are hereby declared to be, citizens of the United States, to all intents and purposes, and shall be entitled to all the rights, privileges and immunities of such citizens." 5 Stat. 647, c. 101, § 7. And such was the act of March 3, 1839, 5 Stat. c. 83, pp. 349, 351, relating to the Brothertown Indians of Wisconsin.

The act of Congress approved February 8, 1887, 24 Stat. 388, c. 119, was much broader, and by its terms made every Indian situated as therein referred to, a citizen of the United States.

Manifestly the nationality of the inhabitants of territory acquired by conquest or cession becomes that of the government under whose dominion they pass, subject to the right of election on their part to retain their former nationality by removal or otherwise, as may be provided.

All white persons or persons of European descent who were born in any of the colonies, or resided or had been adopted there, before 1776, and had adhered to the cause of independence up to July 4, 1776, were by the declaration invested with the privileges of citizenship. *United States* v. *Ritchie*, 17 How. 525, 239; *Inglis* v. *Trustees of Sailors' Snug Harbor*, 3 Pet. 99. In *McIlvaine* v. *Coxe's Lessee*, 4 Cranch, 209, it was held that Mr. Coxe had lost the right of election by remaining in New Jersey after she had declared herself a State, and had passed laws pronouncing him to be a member of the new government; but the right itself was not denied. *Shanks* v. *Dupont*, 3 Pet. 242.

Under the second article of Jay's treaty (8 Stat. 116, 117), British subjects who resided at Detroit before and at the time of the evacuation of the Territory of Michigan, and who continued to reside there afterwards without at any time prior to the expiration of one year from such evacuation declaring their intention of becoming British subjects, became *ipso facto* to all intents and purposes American citizens. *Crane* v. *Reeder*, 25 Michigan, 303.

By section three of Article IV of the Constitution, "new States may be admitted by the Congress into this Union." The section, as originally reported by the committee of detail, contained the language: "If the admission be consented to, the new State shall be admitted on the same terms as the original ones. But the legislature may make conditions with the new States concerning the public debt which shall be then subsisting." These clauses were stricken out, in spite of strenuous opposition, upon the view that wide latitude ought to be given to the Congress, and the denial of any attempt to impede the growth of the western country. Madison Papers, 5 Elliot, 381, 492, 493; 3 Gilpin, 1456.

And paragraph two was added, that "the Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State."

By article three of the treaty of Paris of 1803, (8 Stat. 200, 202,) it was provided that "the inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property and the religion which they profess."

It was said by Mr. Justice Catron, in his separate opinion in *Dred Scott* v. *Sandford*, 19 How. 393, 525: "The settled doctrine in the state courts of Louisiana is, that a French subject coming to the Orleans territory, after the treaty of 1803 was made, and before Louisiana was admitted into the Union, and being an inhabitant at the time of the admission, became a citizen of the United States by that act; that he was one of the inhabitants contemplated by the third article of the treaty, which referred to all the inhabitants embraced within the new State on its admission. That this is the true construction I have no doubt."

In *Desbois's Case*, 2 Martin, 185, (decided in 1812,) one Desbois, of French birth, applied for a license to practise as a counsellor and attorney at law in the Superior Courts of Louisiana, and by one of the rules of the court the applicant could not be admitted unless he was a citizen of the United States. Desbois conceded that he had no claim to citizenship by birth nor by naturalization under the acts of Congress to establish an uniform rule on that subject, but he contended that there was a third mode of acquiring citizenship of the United States, namely, the admission into the Union of a State of which he was a citizen. He contended that as he had, in the year 1806, removed to and settled with his family in the city of New Orleans in the territory of Orleans, in contemplation of the enjoyment of all the advantages which the laws of the territory and of the United States held out to foreigners removing into that territory, and had ever since considered it as his adopted country, he had become a citizen under the act of Congress of March 2, 1805, further providing for the territorial government

of Orleans, the enabling act of February 20, 1811, and that of April 8, 1812, admitting the State.

Judge Martin, who delivered the opinion of the court, referred among other things to the fact that the act of Congress authorizing the formation of the state government of Louisiana was almost literally copied from that which authorized that of Ohio, and, pointing out that by the first section of the latter statute the inhabitants of the designated territory were authorized to form for themselves a state constitution, while by the fourth section the persons entitled to vote for members of the convention were described as, first, all male citizens of the United States, and next, all other persons having in all other respects the legal qualifications to vote for members of the general assembly of the territory, which were a freehold of fifty acres of land in the district and citizenship of one of the States and residence in the district, or the like freehold and two years' residence in the district, said "The word inhabitants, in the first section of this act, must be taken *lato sensu;* it cannot be restrained so as to include citizens of the United States only; for other persons are afterwards called upon to vote. There is not any treaty, or other instrument, which may be said to control it. Every attempt to restrict it must proceed on principles absolutely arbitrary. If the word is to be taken *lato sensu* in the act passed in favor of the people of one Territory, is there any reason to say that we are to restrain it, in another act, passed for similar purposes, in favor of the people of another Territory?" pp. 192, 193.

And after an able discussion of the subject, he concluded that the applicant must be considered a citizen of the State of Louisiana, and entitled to all the rights and privileges of a citizen of the United States.

In 1813, in *United States* v. *Laverty*, 3 Martin, 733, Judge Hall of the District Court of the United States held that the inhabitants of the territory of Orleans became citizens of Louisiana and of the United States by the admission of Louisiana into the Union; denied that the only constitutional mode of becoming a citizen of the United States is naturalization by compliance with the uniform rule established by Congress;

and fully agreed with the decision in Desbois's case, which he cited.

By the ordinance for the government of the Northwest Territory, of July 13, 1787, it was provided that as soon as there should be 5000 free male inhabitants of full age in the district thereby constituted, they were to receive authority to elect representatives to a general assembly, and the qualifications of a representative in such cases were previous citizenship of one of the United States for three years and residence in the district, or a residence of three years in the district and a fee simple estate of 200 acres of land therein. The qualifications of electors were a freehold in fifty acres of land in the district, previous citizenship of one of the United States, and residence, or the like freehold, and two years' residence in the district. And it was also provided that there should be formed in the territory not less than three nor more than five States, with certain boundaries, and that whenever any such State should contain 60,000 free inhabitants, such State should be admitted by its delegates in Congress on an equal footing with the original States in all respects whatever, and should be at liberty to form a permanent constitution and state government, provided it should be republican and in conformity with the articles of compact. 1 Stat. 51*a*; Rev. Stat. 2d. ed. Organic Laws, 13, 14.

Reference to the various acts of Congress creating the Indiana and Illinois territories, 2 Stat. 58, c. 41; 2 Stat. 514, c. 13; the enabling acts under which the state governments of Ohio, Indiana and Illinois were formed, 2 Stat. 173, c. 40; 3 Stat. 289, c. 57; 2 Stat. 428, c. 67; and the act recognizing, and resolutions admitting, those States, 2 Stat. 201, c. 7; 3 Stat. 399; 3 Stat. 536; and to their original constitutions; establishes that the inhabitants or people who were empowered to take part in the creation of these new political organisms, and who continued to participate in the discharge of political functions, included others than those who were originally citizens of the United States. And that the action of Congress was advisedly taken is put beyond doubt by the language used in the legislation in question.

In the case of the admission of Michigan this was strikingly

shown. By the act of Congress of January 11, 1805, 2 Stat. 309, c. 5, a part of the Indiana Territory was constituted the Territory of Michigan, and a government in all respects similar to that provided by the ordinance of 1787 was established. The act of February 16, 1819, 3 Stat. 482, c. 22, authorized that Territory to send a delegate to Congress, and conferred the right of suffrage on the free white male citizens of the Territory who had resided therein one year next preceding the election and had paid county or territorial taxes. The act of March 3, 1823, 3 Stat. 769, c. 36, provided that all citizens of the United States having the qualifications prescribed by the act of February 16, 1819, should be entitled to vote and be eligible to office. By an act of the territorial legislature of January 26, 1835, the free white male inhabitants of the Territory of full age, who had resided therein three months preceding "the fourth day of April next in the year one thousand eight hundred and thirty-five," were authorized to choose delegates to form a constitution and state government. Mich. Laws, 1835, pp. 72, 75. Delegates were elected accordingly, and a constitution completed June 29, 1835, and ratified by a vote of the people November 2, 1835, which provided that every white male citizen above the age of twenty-one years, who had resided in the State six months next preceding any election, should be entitled to vote at any election, "and every white male inhabitant of the age aforesaid, who may be a resident of the State at the time of the signing of this constitution, shall have the right of voting as aforesaid." 1 Charters and Constitutions, 983, 984. This constitution was laid before Congress by President Jackson in a special message, December 9, 1835, and a bill was introduced for the admission of Michigan into the Union. While this was under consideration an amendment to the provision that on the assent being given by a convention of the people of Michigan to certain boundaries defined in the bill, the State should be admitted, to strike out the words "people of the said State" and insert "by the free male white citizens of the United States over the age of twenty-one years, residing within the limits of the proposed State," was voted down; as was also another amendment proposing

to insert after that part of the bill which declared the constitution of the new State ratified and confirmed by Congress, the words "except that provision of said constitution by which aliens are permitted to enjoy the right of suffrage." The act was passed June 15, 1836, and the conditions imposed having been first rejected and then finally accepted, the State was admitted into the Union by the act of January 26, 1837.

In all these instances citizenship of the United States in virtue of the recognition by Congress of the qualified electors of the State as citizens thereof, was apparently conceded, and it was the effect in that regard that furnished a chief argument to those who opposed the admission of Michigan. It may be added as to that State that the state constitution of 1850, as amended in 1870, preserved the rights as an elector of "every male inhabitant, residing in the State on the 24th day of June, 1835." And in *Attorney General* v. *Detroit*, 78 Michigan, 545, 563, the Supreme Court of Michigan assigned as one of the reasons for holding the registry law under consideration invalid, that no provision was therein made for this class of voters, nor for the inhabitants who had resided in Michigan in 1850 and declared their intention to become citizens of the United States, who had the right to vote under the constitution of 1850,

The sixth article of the treaty of 1819 with Spain, 8 Stat. 256, contained a provision to the same effect as that in the treaty of Paris, and Mr. Chief Justice Marshall said (*Amer. Ins. Co.* v. *Canter*, 1 Pet. 511, 542): "This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities of the citizens of the United States. It is unnecessary to inquire whether this is not their condition, independent of stipulation. They do not, however, participate in political power; they do not share in the government, till Florida shall become a State. In the meantime, Florida continues to be a Territory of the United States; governed by virtue of that clause in the Constitution, which empowers Congress 'to make all needful rules and regulations, respecting the Territory, or other property belonging to the United States.'"

At the second session of the Twenty-seventh Congress, in the case of David Levy, who had been elected a delegate from the Territory of Florida, where it was alleged that he was not a citizen of the United States, it was held by the House Committee on Elections that "it matters nothing whether the naturalization be effected by act of Congress, by treaty or by the admission of new States, the provision is alike applicable."

The question turned on whether Mr. Levy's father was an inhabitant of Florida at the time of its transfer to the United States, as the son admitted that he was not a native-born citizen of the United States, but claimed citizenship through that of his father effected by the treaty while he was a minor. The argument of the report in support of the position that "no principle has been more repeatedly announced by the judicial tribunals of the country, and more constantly acted upon, than that the leaning, in questions of citizenship, should always be in favor of the claimant of it," and that liberality of interpretation should be applied to such a treaty, is well worthy of perusal. Contested Elections, 1834, 1835, 2d Session, 38th Congress, 41.

By the eighth article of the treaty with Mexico of 1848, those Mexicans who remained in the territory ceded, and who did not declare within one year their intention to remain Mexican citizens, were to be deemed citizens of the United States. 9 Stat. 930.

By the annexation of Texas, under a joint resolution of Congress of March 1, 1845, and its admission into the Union on an equal footing with the original States, December 29, 1845, all the citizens of the former republic became, without any express declaration, citizens of the United States. 5 Stat. 798; 9 Stat. 108; *McKinney* v. *Saviego*, 18 How. 235; *Cryer* v. *Andrews*, 11 Texas, 170; *Barrett* v. *Kelly*, 31 Texas, 476; *Carter* v. *Territory*, 1 N. Mex. 317.

It is too late at this day to question the plenary power of Congress over the Territories. As observed by Mr. Justice Matthews, delivering the opinion of the court in *Murphy* v. *Ramsey*, 114 U. S. 15, 44: "It rests with Congress to say whether, in a given case, any of the people, resident in the

Territory, shall participate in the election of its officers, or the making of its laws; and it may, therefore, take from them any right of suffrage it may previously have conferred, or at any time modify or abridge it as it may deem expedient. The right of local self-government, as known to our system as a constitutional franchise, belongs, under the Constitution, to the States and to the people thereof, by whom that Constitution was ordained, and to whom by its terms all power not conferred by it upon the government of the United States was expressly reserved. The personal and civil rights of the inhabitants of the Territories are secured to them, as to other citizens, by the principles of constitutional liberty which restrain all the agencies of government, state and national; their political rights are franchises which they hold as privileges in the legislative discretion of the Congress of the United States. . . . If we concede that this discretion in Congress is limited by the obvious purposes for which it was conferred, and that those purposes are satisfied by measures which prepare the people of the Territories to become States in the Union, still the conclusion cannot be avoided, that the act of Congress here in question is clearly within that justification."

Congress having the power to deal with the people of the Territories in view of the future States to be formed from them, there can be no doubt that in the admission of a State a collective naturalization may be effected in accordance with the intention of Congress and the people applying for admission.

Admission on an equal footing with the original States, in all respects whatever, involves equality of constitutional right and power, which cannot thereafterwards be controlled, and it also involves the adoption as citizens of the United States of those whom Congress makes members of the political community, and who are recognized as such in the formation of the new State with the consent of Congress.

The organic law under which the Territory of Nebraska was organized, approved May 30, 1854, 10 Stat. 277, c. 59, provided in its fourth section for a legislative assembly, con-

sisting of a council and a house of representatives, and that the members of the assembly should have the qualification of voters as thereinafter prescribed. Its fifth section was as follows:

"SEC. 5. *And be it further enacted*, That every free white male inhabitant above the age of twenty-one years who shall be an actual resident of said Territory, and shall possess the qualifications hereinafter prescribed, shall be entitled to vote at the first election, and shall be eligible to any office within the said Territory; but the qualifications of voters, and of holding office, at all subsequent elections, shall be such as shall be prescribed by the legislative assembly; *Provided*, that the right of suffrage and of holding office shall be exercised only by citizens of the United States and those who shall have declared on oath their intention to become such, and shall have taken an oath to support the Constitution of the United States and the provisions of this act: *And, provided further*, That no officer, soldier, seaman, or marine, or other person in the army or navy of the United States, or attached to troops in the service of the United States, shall be allowed to vote or hold office in said Territory, by reason of being on service therein."

Sections 10, 11 and 12 of chapter 9 of a general code for that Territory entitled "Elections," approved January 26, 1856, read thus:

"SEC. 10. Every free white male citizen of the United States, who has attained the age of twenty-one years, and those who shall have declared on oath their intention to become such, and shall have taken an oath to support the Constitution of the United States, and the provisions of the organic law of this Territory, shall be entitled to vote in the precinct where he resides, at all elections. *Provided*, he has been an inhabitant of this Territory forty days and of the county twenty days next preceding the election.

"SEC. 11. Any member of the board of electors, or persons who have voted at such election, may challenge any elector proposing to vote, whereupon one of the said board shall tender to such elector the following oath: I, A B, solemnly swear that I am a citizen of the United States, or that I have taken

an oath to become such (as the case may be); that I have been an inhabitant of the county of ——— for the last twenty days, and in this Territory for the last forty days, and have attained the age of twenty-one years to the best of my knowledge and belief.

"Upon taking such oath his ballot shall be received.

"SEC. 12. Any person taking any of the oaths herein contained, knowing them to be false, shall be deemed guilty of perjury." Sess. Laws Neb. 1855–56, pp. 50, 51.

By section 4 of chapter 27, entitled "Officers," Sess. Laws Neb. 1855–56, p. 79, it was enacted: "Neither shall any person be entitled to hold any office of trust or profit in this Territory unless he be a free white male citizen of the United States, and over the age of twenty-one years."

If by this provision it was intended by the territorial legislature to deprive those who had declared their intention of becoming citizens of the right to hold office, we do not regard the attempt to do so as substantially affecting the argument.

By an act respecting elections, approved January 10, 1862, Sess. Laws Neb. 1861–62, p. 92, it was provided that every free white male citizen of the United States, and those who had in accordance with the laws of the United States filed their declaration of intention to become such, and who had attained the age of twenty-one years, should be entitled to vote at any election in this Territory. Punishment was prescribed for persons who should vote when not citizens of the United States, or when they had not declared their intention to become such; and provision was made for challenges on the ground that the person had not made the declaration, provided that no such declaration of intention need be produced where the person stated that by reason of the naturalization of his parents, or one of them, he had become a citizen of the United States, and when or where his parent or parents were naturalized. Similar provisions were contained in an act passed in 1864. Sess. Laws. Neb. 1864, p. 108.

On April 19, 1864, Congress passed an act "to enable the people of Nebraska to form a constitution and state government, and for the admission of such State into the Union on

an equal footing with the original States." 13 Stat. 47, c. 59. The first section was: "That the inhabitants of that portion of the Territory of Nebraska included in the boundaries hereinafter designated, be, and they are hereby, authorized to form for themselves a constitution and state government, with the name aforesaid, which State, when so formed, shall be admitted into the Union as hereinafter provided." The third section read: "That all persons qualified by law to vote for representatives to the general assembly of said Territory shall be qualified to be elected; and they are hereby authorized to vote for and choose representatives to form a convention, under such rules and regulations as the governor of said Territory may prescribe, and also to vote upon the acceptance or rejection of such constitution as may be formed by said convention, under such rules and regulations as said convention may prescribe; and if any of said citizens are enlisted in the army of the United States, and are still within said Territory, they shall be permitted to vote at their place of rendezvous; . . . and the governor of said Territory shall, by proclamation, on or before the first Monday of May next, order an election of the representatives aforesaid to be held on the first Monday in June thereafter throughout the Territory; and such election shall be conducted in the same manner as is prescribed by the laws of said Territory regulating elections therein for members of the house of representatives; and the number of members to said convention shall be the same as now constitute both branches of the legislature of the aforesaid Territory."

Section five provided for the submission of the constitution to the qualified voters of the Territory as thereinbefore designated; and that if a majority of the legal votes were cast for the constitution, the result should be certified to the President, whereupon it should be his duty "to issue his proclamation declaring the State admitted into the Union on an equal footing with the original States, without any further action whatever on the part of Congress."

No action was taken by the convention which was elected under this law, but a constitution was subsequently framed by

the territorial legislature, which completed it February 9, 1866. It was submitted to the people at an election held June 21, 1866, and ratified by a vote of 3938 against 3838.

On the 9th of February, 1867, 14 Stat. 391, an act for the admission of Nebraska into the Union became a law, which recited that whereas, on the 19th of April, 1864, Congress passed an act to enable the people of Nebraska to form a constitution and state government, and offered to admit said State when so formed into the Union upon compliance with certain conditions therein specified; and whereas it appears that said people have adopted a constitution which, upon due examination, is found to conform to the provisions and comply with the conditions of said act, and that they now ask for admission into the Union, therefore, be it enacted, etc., "that the constitution and state government which the people of Nebraska have formed for themselves be, and the same is hereby, accepted, ratified and confirmed; and that the said State of Nebraska shall be, and is hereby declared to be, one of the United States of America, and is hereby admitted into the Union upon an equal footing with the original States in all respects whatsoever." By the second section it was declared that the new State was entitled to all the rights, privileges, grants and immunities and was subject to all the conditions and restrictions of the enabling act. By the third section the fundamental condition was imposed upon the taking effect of the act, that there should be within the State of Nebraska no denial of the elective franchise, or of any other right, to any person, by reason of race or color, excepting Indians not taxed, and the further fundamental condition that the legislature of the State should declare the assent of the State to such conditions, proof of which being transmitted to the President, he by proclamation should announce the fact, and the admission of the State should be accomplished. This third section was accepted and ratified by the legislature of Nebraska on the 20th of February following and declared to be part of the organic law of the State; whereupon, on March 1, 1867, 14 Stat. 820, the President issued his proclamation that "whereas the Congress of the United States did, by an act,

approved on the nineteenth day of April, one thousand eight hundred and sixty-four authorize the people of the Territory of Nebraska to form a constitution and state government, and for the admission of such State into the Union on an equal footing with the original States, upon certain conditions in said act specified; and whereas said people did adopt a constitution conforming to the provisions and conditions of said act, and ask admission into the Union;" etc., therefore the admission of the State into the Union was complete.

This constitution provided, Art. II, §§ 1, 2, 2 Charters and Constitutions, 1205, that the electors should be white citizens of the United States and white persons of foreign birth who had declared their intention to become such, and it was therefore that Congress imposed the condition referred to, which operated to prevent discrimination by reason of color, and may have had a broader effect, which it is not now necessary to consider.

The fourteenth section of the first article, (2 Charters and Constitutions, 1204,) read as follows: "No distinction shall ever be made by law between resident aliens and citizens in reference to the possession, enjoyment or descent of property," and this, it seems to us, taken in connection with the other provisions, was a clear recognition of the distinction between those who had and those who had not elected to become aliens.

It follows from these documents that Congress regarded as citizens of the Territory all who were already citizens of the United States, and all who had declared their intention to become such. Indeed, they are referred to in section three of the enabling act as citizens, and by the organic law the right of suffrage and of holding office had been allowed to them. Those whose naturalization was incomplete were treated as in the same category as those who were already citizens of the United States. What the State had power to do after its admission is not the question. Before Congress let go its hold upon the Territory, it was for Congress to say who were members of the political community. So far as the original States were concerned, all those who were citizens of such States became upon the formation of the Union citizens of the United

States, and upon the admission of Nebraska into the Union "upon an equal footing with the original States, in all respects whatsoever," the citizens of what had been the Territory became citizens of the United States and of the State.

As remarked by Mr. Chief Justice Waite in *Minor* v. *Happersett*, 21 Wall. 162, 167: "Whoever, then, was one of the people of either of these States when the Constitution of the United States was adopted, became *ipso facto* a citizen — a member of the nation created by its adoption. He was one of the persons associating together to form the nation, and was, consequently, one of its original citizens. As to this there has never been a doubt. Disputes have arisen as to whether or not certain persons or certain classes of persons were part of the people at the time, but never as to their citizenship if they were."

But it is argued that James E. Boyd had never declared his intention to become a citizen of the United States, although his father had, and that because, as alleged, his father had not completed his naturalization before the son attained his majority, the latter cannot be held to come within the purview of the acts of Congress relating to the Territory and the admission of the State, so as to be entitled to claim to have been made a citizen thereby.

The act of March 26, 1790, 1 Stat. 103, c. 3, provided for the naturalization of aliens and then that "the children of such persons so naturalized, dwelling within the United States, being under the age of twenty-one years at the time of such naturalization, shall also be considered as citizens of the United States."

The third section of the act of January 29, 1795, 1 Stat. 414, 415, c. 20, provided "that the children of persons duly naturalized, dwelling within the United States, and being under the age of twenty-one years, at the time of such naturalization, and the children of citizens of the United States, born out of the limits and jurisdiction of the United States, shall be considered as citizens of the United States," etc.

The fourth section of the act of April 14, 1802, 2 Stat. 153, 155, c. 28, carried into the Revised Statutes as section 2172,

was: "That the children of persons duly naturalized under any of the laws of the United States, or who, previous to the passing of any law on that subject, by the government of the United States, may have become citizens of any one of the said States, under the laws thereof, being under the age of twenty-one years, at the time of their parents being so naturalized or admitted to the rights of citizenship, shall, if dwelling in the United States, be considered as citizens of the United States." In *Campbell* v. *Gordon*, 6 Cranch, 176, it was held that this section conferred the rights of citizenship upon the minor child of a parent who had been duly naturalized under the act of 1795, although the child did not become a resident of the United States until she came here after that, but before the act of 1802 was passed.

The rule was to be a uniform rule, and we perceive no reason for limiting such a rule to the children of those who had been already naturalized. In our judgment the intention was that the act of 1802 should have a prospective operation. *United States* v. *Kellar*, 13 Fed. Rep. 82; *West* v. *West*, 8 Paige, 433; *State* v. *Andriano*, 92 Missouri, 70; *State* v. *Penney*, 10 Arkansas, 621; *O'Connor* v. *The State*, 9 Florida, 215.

By the second section of the act of March 26, 1804, 2 Stat. 292, c. 47, p. 293, if any alien who had complied with the terms of the act should die without having completed his naturalization, his widow and children should be considered citizens upon taking the oaths prescribed by law; and this was carried forward into section 2168 of the Revised Statutes.

By the first section of the act of May 26, 1824, 4 Stat. 69, c. 186, carried forward into section 2167 of the Revised Statutes, any alien, being a minor, who shall have resided in the United States three years next preceding his arrival at majority and continued to reside therein, may, upon reaching the age of twenty-one years, and after a residence of five years, including the three years of minority, be admitted a citizen of the United States without having made during minority the declaration of intention required in the case of aliens.

The statutory provisions leave much to be desired, and the attention of Congress has been called to the condition of the

laws in reference to election of nationality; and to the desirability of a clear definition of the status of minor children of fathers who had declared their intention to become citizens, but had failed to perfect their naturalization; and of the status gained by those of full age by the declaration of intention. 2 Whart. Int. Dig. 340, 341, 350.

Clearly minors acquire an inchoate status by the declaration of intention on the part of their parents. If they attain their majority before the parent completes his naturalization, then they have an election to repudiate the status which they find impressed upon them, and determine that they will accept allegiance to some foreign potentate or power rather than hold fast to the citizenship which the act of the parent has initiated for them. Ordinarily this election is determined by application on their own behalf, but it does not follow that an actual equivalent may not be accepted in lieu of a technical compliance.

James E. Boyd was born in Ireland of Irish parents in 1834, and brought to this country in 1844 by his father, Joseph Boyd, who settled at Zanesville, Muskingum County, Ohio, and on March 5, 1849, declared his intention to become a citizen of the United States. In 1855 James E. Boyd, who had grown up in the full belief of his father's citizenship and had been assured by him that he had completed his naturalization by taking out his second papers in 1854, voted in Ohio as a citizen. In August, 1856, he removed to the Territory of Nebraska. In 1857 he was elected and served as county clerk of Douglas County; in 1864 he was sworn into the military service and served as a soldier of the Federal government to defend the frontier from an attack of Indians; in 1866 he was elected a member of the Nebraska legislature and served one session; in 1871 he was elected a member of the convention to frame a state constitution and served as such; in 1875 he was again elected and served as a member of the convention which framed the present state constitution; in 1880 he was elected and acted as president of the city council of Omaha; and in 1881 and 1885, respectively, was elected mayor of that city, serving in all four years. From 1856 until the State was ad-

mitted, and from thence to this election, he had voted at every election, territorial, state, municipal and national. He had taken, prior to the admission of the State, the oath required by law in entering upon the duties of the offices he had filled, and sworn to support the Constitution of the United States and the provisions of the organic act under which the Territory of Nebraska was created. For over thirty years prior to his election as governor he had enjoyed all the rights, privileges and immunities of a citizen of the United States and of the Territory and State, as being in law, as he was in fact, such citizen.

When he removed to Nebraska, that Territory was to a large extent a wilderness, and he spent years of extreme hardship upon the frontier, one of the pioneers of the new settlement and one of the inhabitants who subsequently formed a government for themselves. The policy which sought the development of the country by inviting to participation in all the rights, privileges and immunities of citizenship, those who would engage in the labors and endure the trials of frontier life, which has so vastly contributed to the unexampled progress of the nation, justifies the application of a liberal rather than a technical rule in the solution of the question before us.

We are of opinion that James E. Boyd is entitled to claim that if his father did not complete his naturalization before his son had attained majority, the son cannot be held to have lost the inchoate status he had acquired by the declaration of intention, and to have elected to become the subject of a foreign power, but, on the contrary, that the oaths he took and his action as a citizen entitled him to insist upon the benefit of his father's act, and placed him in the same category as his father would have occupied if he had emigrated to the Territory of Nebraska; that, in short, he was within the intent and meaning, effect and operation of the acts of Congress in relation to citizens of the Territory, and was made a citizen of the United States and of the State of Nebraska under the organic and enabling acts and the act of admission.

(2) Another and shorter course of reasoning leads to the same conclusion.

The respondent, in his answer, after stating that his father, on March 5, 1849, when the respondent was about fourteen years of age, made before a court of the State of Ohio his declaration of intention to become a citizen of the United States; and averring "that his father for forty-two years last past has enjoyed and exercised all of the rights, immunities and privileges and discharged all the duties of a citizen of the United States and of the State of Ohio, and was in all respects and to all intents and purposes a citizen of the United States and of the State of Ohio;" and particularly alleging his qualifications to be a citizen, and his acting as such for forty years, voting and holding office in that State; further distinctly alleges "on information and belief, that prior to October, 1854, his father did in fact complete his naturalization in strict accordance with the acts of Congress known as the naturalization laws so as to admit and constitute him a full citizen of the United States thereunder, he having exercised the rights of citizenship herein described, and at said time informed respondent that such was the fact."

As the allegation last quoted sets up a right and privilege claimed under the laws of the United States, this court must determine for itself the question of the sufficiency of this allegation, and is not concluded by the view taken of that question by the Supreme Court of Nebraska. In the words of Mr. Justice Miller, speaking for this court: "The question whether a plea sets up a sufficient defence, when the defence relied on arises under an act of Congress, does present, and that necessarily, a question of Federal law; for the question is and must be, does the plea state facts which under the act of Congress constitute a good defence?" *Mitchell* v. *Clark*, 110 U. S. 633, 645.

It is true that naturalization under the acts of Congress known as the naturalization laws can only be completed before a court, and that the usual proof of naturalization is a copy of the record of the court. But it is equally true that where no record of naturalization can be produced, evidence that a person, having the requisite qualifications to become a citizen, did in fact and for a long time vote and hold office and exercise

rights belonging to citizens, is sufficient to warrant a jury in inferring that he had been duly naturalized as a citizen. *Blight* v. *Rochester*, 7 Wheat. 535, 546; *Hogan* v. *Kurtz*, 94 U. S. 773, 778. And by the constitution of Ohio of 1851, none but white male citizens of the United States were entitled to vote, or to hold office. Art. 5, sec. 1; art. 15, sec. 4; Charters and Constitutions, 1472, 1478.

Such being the settled law, we can have no doubt that the fact that the respondent's father became a naturalized citizen of the United States before October, 1854, is well pleaded in the allegation in question, and is therefore admitted by the demurrer. The allegation "that prior to October, 1854, his father did in fact complete his naturalization in strict accordance with the acts of Congress known as the naturalization laws so as to admit and constitute him a full citizen of the United States thereunder," necessarily implies that he had been duly naturalized before a court as required by those laws. Specific allegations of the time and place at which, and of the court before which, he was so naturalized, or setting forth a record of his naturalization, would have been superfluous, and, in view of the respondent's imperfect information, as manifest upon the face of the allegation, of a transaction taking place so long ago, hardly possible.

Under this allegation, and the earlier allegations leading up to it, if traversed, a jury would have been warranted in inferring that the respondent's father became a citizen of the United States before October, 1854, and consequently that the respondent himself was likewise a citizen.

For this reason, without regard to any other question argued in the case, the respondent was entitled to judgment upon the demurrer.

Mr. Justice Harlan, Mr. Justice Gray and Mr. Justice Brown concur in the conclusion of the court upon the latter course of reasoning only.

All the justices, except Mr. Justice Field, unite in holding that this court has jurisdiction of the case, and that upon this record James E. Boyd had been for two years, next preceding

his election to the office of governor, a citizen of the United States and of the State of Nebraska.

The judgment of the Supreme Court of Nebraska is reversed, and the cause remanded to be proceeded in according to law and in conformity with this opinion.

MR. JUSTICE FIELD dissenting.

I dissent from the judgment just rendered. I do not think that this court has any jurisdiction to determine a disputed question as to the right to the governorship of a State, however that question may be decided by its authorities. I agree that the States of the American Union are not in all respects independent political communities; I agree that they do not possess that supreme political authority which would entitle them to be called sovereign States in the full sense of those terms, as they are often designated. They are qualified sovereignties, possessing only the powers of an independent political organization which are not ceded to the general government or prohibited to them by the Constitution. But, except as such powers are ceded to the general government or prohibited to them, the States are independent political communities. This is not a matter of argument or inference, but is the express declaration of the Tenth Amendment. As forcibly stated by Mr. Justice Nelson, speaking for this court, "the general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the Tenth Amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the States." *The Collector* v. *Day*, 11 Wall. 113, 124. In no respect is this independence of the States more marked, or more essential to their peace and tranquillity, than in their absolute power to prescribe the qualifications of all their state officers, from their chief magistrate to the lowest official employed in the administration of their

local government; to determine the manner of their election, whether by open or secret ballot, and whether by local bodies or by general suffrage; the tenure by which they shall hold their respective offices; the grounds on which their election may be contested, the tribunals before which such contest shall be made, the manner in which it shall be conducted; and the effect to be given to the decision rendered. With none of these things can the government of the United States interfere. In all these particulars the States, to use the language of Mr. Justice Nelson, are as independent of the general government as that government within its sphere is independent of the States. Its power of interference with the administration of the affairs of the State and the officers through whom they are conducted extends only so far as may be necessary to secure to it a republican form of government, and protect it against invasion, and also against domestic violence on the application of its legislature, or of its executive when that body cannot be convened. Const. Art. IV, sec. 4. Except as required for these purposes, it can no more interfere with the qualifications, election and installation of the state officers, than a foreign government. And all attempts at interference with them in those respects by the executive, legislative or judicial departments of the general government are in my judgment so many invasions upon the reserved rights of the States and assaults upon their constitutional autonomy.

No clause of the Constitution can be named which in any respect gives countenance to such invasion. The fact that one of the qualifications prescribed by the State for its officers can only be ascertained and established by considering the provisions of a law of the United States in no respect authorizes an interference by the general government with the state action. Because an officer of a State must be a citizen of the United States it does not follow that the tribunals of the United States can alone determine that fact, and that the decision of the State in respect to it can be supervised and controlled by the Federal authorities. Nor is there any decision of this court that sanctions any such interference. There is a mere dictum in *Missouri* v. *Andriano;* 138 U. S. 496, 499, but no decision to that effect.

That case involved a contest between the parties for the office of sheriff of a county in Missouri. Among other things the constitution of that State declared that no person should be elected to any office in the State who was not a citizen of the United States. The relator claimed to have been in possession of the office since 1884 and entitled to continue until his successor was elected, commissioned and qualified; and that the respondent was not entitled to the office because he was not a citizen under the Constitution of the United States, having been born in Germany, and not having been naturalized. To this the respondent replied, admitting his foreign birth, and that he had never been naturalized under the laws of the United States, but claiming that under the act of Congress of 1802 he became and was a citizen by the naturalization of his father, that act providing that the children of citizens of the United States should, though born out of their limits and jurisdiction, be considered as citizens.

Under that act the Supreme Court of Missouri held that the respondent was a citizen of the United States. The case coming to this court, it was decided that when a decision of a state court was in favor of a right or privilege claimed under a statute of the United States, this court had no jurisdiction to review it, and the writ of error was accordingly dismissed. In the opinion delivered by the justice of this court it was said that had the judgment of the Supreme Court of Missouri been adverse to the claim of the respondent there could be no doubt of his right to a writ of error from this court to review its ruling — a question which was not in judgment, and what, therefore, was said respecting it was a mere dictum, without authoritative force.

The office of sheriff was not a right or privilege claimed under a law of the United States, but was a right or privilege claimed by the election under the laws of Missouri. The mere fact that it was necessary that the incumbent of the office should also be a citizen of the United States did not of itself give him a right to that office. It would, indeed, be a strange ruling to declare that an office which required the votes of the people of a State or of one of its districts was a right or privi-

lege under a law of the United States, because one of the qualifications of the incumbent was that he should be a citizen of the United States. The necessity of referring to a law of the United States to ascertain what constituted citizenship did not make the respondent's right to the office dependent upon that fact in any such sense as to bring it within the cognizance of the Federal courts. Equally might it be said that a contested claim to a seat in the legislature of a State could be brought under their cognizance when the ground of contest happened to be the disputed citizenship of one of the contestants. It is true the answer to the attempted exercise of jurisdiction by the courts in the latter case would be, that it is the settled law of legislative bodies, and hitherto recognized in all our State constitutions, that each house shall be the exclusive judge of the election and qualification of its members. But no less settled, and hitherto universally recognized in this country, is the law which vests exclusive jurisdiction in each State over the election, qualification and installation of its chief executive. There seems to me to be the same inappropriateness and want of authority in proceeding in the Federal courts for the office in the one case as in the other.

My objection to the decision is not diminished by the fact that there is no power in this court to enforce its decision upon the State of Nebraska should resistance be made to it. Should the incumbent declared by this court not to be entitled to the office, refuse to surrender it and the state authorities should stand by him in such refusal, what could be done about it? He might well say, "I have been declared by the duly constituted authorities of the State, who alone have the right to inquire into the matter, to be entitled to the office, and I deny the authority of the general government, or any department of it, to interfere with my possession of the office." How could this court in such case enforce its order? The presence of the marshal with a posse to attempt it would be a painful exhibition of weakness. Would the court call upon the general government to send an army into the State to force upon it a governor who has been declared by its duly constituted authorities not to be entitled to the office and to

oust the one who has been declared by them to be entitled to it?

I doubt whether any such proceeding would be successfully carried out or that the attempt to do it would be sustained by the Executive or by Congress or by the people anywhere. I can see only mischief and trouble to follow from the assertion of any such power over the authorities of a State as is claimed in this case. If the right of this court to interfere in this case can be sustained every candidate for office alleging that the successful party has not some qualification prescribed by statute, which can only be defined by reference to a Federal law, will claim a right to invoke the interference of the Federal judiciary to determine whether he ought or not to have been declared elected. There is always and naturally much bitterness and disturbing effect following interferences by the general government with affairs exclusively belonging to a State, and this result would be greatly augmented by recognizing the right here asserted as vested in the Federal judiciary. Few things in my judgment would have a greater tendency to destroy the independence and autonomy of the States, reduce them to a humiliating position, and engender constant irritation. Suppose the authorities of the State do decide erroneously as to the qualification of a person declared elected, if the State acquiesces in the decision, what public policy is to be subserved by invoking the interference respecting it of the Federal authorities, whom the decision does not concern?

There is already sufficient irritation from alleged interferences, whether true or not, in local matters by such authorities, without adding to it a thousandfold by subjecting the qualifications of state officers and their installation to unauthorized Federal scrutiny.

I therefore at the outset earnestly protest against the assumption of any such authority.

UNION MUTUAL LIFE INSURANCE COMPANY v. HANFORD.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 25. Argued and submitted March 26, 1891. — Decided February 29, 1892.

Under the law of Illinois, a grantee who by the terms of an absolute conveyance from the mortgagor assumes the payment of the mortgage debt, is liable to an action at law by the mortgagee; the relation of the grantee and the grantor towards the mortgagee is that of principal and surety; and therefore a subsequent agreement of the mortgagee with the grantee, without the assent of the grantor, extending the time of payment of the mortgage debt, discharges the grantor from all personal liability for that debt.

THIS was a bill in equity, filed March 30, 1878, by the Union Mutual Life Insurance Company, a corporation of Maine, against Philander C. Hanford, Orrin P. Chase, Frederick L. Fake and Lucy D. Fake, his wife, citizens of Illinois, to foreclose by sale a mortgage of land in Chicago, and to obtain a decree for any balance due the plaintiff above the proceeds of the sale. Fake and wife were defaulted, and Hanford and Chase answered. The case was heard upon a master's report and the evidence taken before him, by which (so far as is material to be stated) it appeared to be as follows:

On September 9, 1870, Hanford and Chase mortgaged the land to one Schureman to secure the payment of three promissory notes of that date, signed by them, and payable to his order, one for $5000 in one year, and the second for $5000 in two years, each with interest at the rate of eight per cent annually; and the third for $6000 in three years, with interest at the rate of ten per cent annually.

On January 30, 1871, (the first note having been paid,) the plaintiff, through one Boone, its financial agent, bought the mortgage, and Schureman indorsed the remaining notes and assigned the mortgage to the plaintiff.

Argument for Appellant.

On September 9, 1872, Hanford and Chase conveyed the land to Mrs. Fake by deed of warranty, "with the exception of and subject to" the mortgage, (describing it,) "which said mortgage or trust deed, and the notes for which the same is collateral security," (describing them,) "it is hereby expressly agreed shall be assumed and paid by the party of the second part, and when paid are to be delivered fully cancelled to said Chase and Hanford."

At or about the date of this conveyance, Chase called with Fake at Boone's office, and told him that Hanford and Chase had sold the property to Mrs. Fake, and that she was to pay the mortgage, and Boone, as Chase testified, "said 'all right,' or something of that sort." At the same interview, Boone, as the plaintiff's agent, in consideration of $150 paid him by Chase, extended the $5000 note until September 9, 1874.

Fake, as his wife's agent, afterwards paid interest on the notes to Boone, as the plaintiff's agent; and on January 9, 1875, for the sum of $340, obtained from him, without the knowledge of Hanford or Chase, an extension of the notes until September 9, 1875.

The principal defence relied on by Hanford and Chase was that they were discharged from personal liability on the notes by this extension of the time of payment without their consent.

The value of the mortgaged premises in September, 1874, was $18,000 to $19,000, and at the date of the master's report in April, 1879, was $10,000 to $15,000 only.

The land was sold by the master, under order of the court, for $12,000, which was insufficient to satisfy the sums due on the mortgage; and the plaintiff, after notice to Hanford and Chase, moved for a deficiency decree for a sum amounting, with interest, to more than $5000. The Circuit Court overruled the motion. 27 Fed. Rep. 588. The plaintiff appealed to this court.

Mr. P. S. Grosscup and *Mr. Frank L. Wean* for appellant, submitted on their brief.

Opinion of the Court.

The appellees, being at the inception of the notes the principal debtors, continued, notwithstanding the assumption by Lucy D. Fake, to be personally liable thereon, and the appellant never lost the right to proceed directly upon the personal obligation. *Ober* v. *Gallagher*, 93 U. S. 199; *Vansant* v. *Allmon*, 23 Illinois, 30.

The assumption of the notes by Lucy D. Fake, at most, added only another principal obligor to the debt. It did not change the obligation of the appellees from that of being principal obligors to that of being sureties merely. *Shepherd* v. *May*, 115 U. S. 505; *Cucullu* v. *Hernandez*, 103 U. S. 105; *Sprigg* v. *Bank of Mt. Pleasant*, 10 Pet. 255; *Sprigg* v. *Bank of Mt. Pleasant*, 14 Pet. 201; *Corbett* v. *Waterman*, 11 Iowa, 86; *Waters* v. *Hubbard*, 44 Connecticut, 340; *Conwell* v. *McCowan*, 81 Illinois, 285; *Crawford* v. *Edwards*, 33 Michigan, 354.

An extension of time for the payment of the indebtedness to one principal debtor does not discharge a co-debtor, who is also a principal, from his obligation upon the debt. *Shepherd* v. *May*, 115 U. S. 505; *Cucullu* v. *Hernandez*, 103 U. S. 105; *Sprigg* v. *Bank of Mt. Pleasant*, 10 Pet. 255; *S. C.* 14 Pet. 201; *Corbett* v. *Waterman*, 11 Iowa, 86; *Waters* v. *Hubbard*, 44 Connecticut, 340; *Wilson* v. *Foot*, 11 Met. (Mass.) 285; *Draper* v. *Weld*, 13 Gray, 580.

Mr. Walter H. Smith for appellees. *Mr. J. H. McGowan* was with him on the brief.

Mr. Justice Gray, after stating the case as above, delivered the opinion of the court.

Few things have been the subject of more difference of opinion and conflict of decision than the nature and extent of the right of a mortgagee of real estate against a subsequent grantee who by the terms of the conveyance to him agrees to assume and pay the mortgage.

All agree that the grantee is liable to the grantor, and that, as between them, the grantee is the principal and the grantor

is the surety for the payment of the mortgage debt. The chief diversity of opinion has been upon the question whether the grantee does or does not assume any direct liability to the mortgagee.

By the settled law of this court, the grantee is not directly liable to the mortgagee, at law or in equity; and the only remedy of the mortgagee against the grantee is by bill in equity in the right of the mortgagor and grantor, by virtue of the right in equity of a creditor to avail himself of any security which his debtor holds from a third person for the payment of the debt. *Keller* v. *Ashford*, 133 U. S. 610; *Willard* v. *Wood*, 135 U. S. 309. In that view of the law, there might be difficulties in the way of holding that a person who was under no direct liability to the mortgagee was his principal debtor, and that the only person who was directly liable to him was chargeable as a surety only, and consequently that the mortgagee, by giving time to the person not directly and primarily liable to him, would discharge the only person who was thus liable. *Shepherd* v. *May*, 115 U. S. 505, 511; *Keller* v. *Ashford*, 133 U. S. 610, 625. But the case at bar does not present itself in that aspect.

The question whether the remedy of the mortgagee against the grantee is at law and in his own right, or in equity and in the right of the mortgagor only, is, as was adjudged in *Willard* v. *Wood*, above cited, to be determined by the law of the place where the suit is brought. By the law of Illinois, where the present action was brought, as by the law of New York and of some other States, the mortgagee may sue at law a grantee who, by the terms of an absolute conveyance from the mortgagor, assumes the payment of the mortgage debt. *Dean* v. *Walker*, 107 Illinois, 540, 545, 550; *Thompson* v. *Dearborn*, 107 Illinois, 87, 92; *Bay* v. *Williams*, 112 Illinois, 91; *Burr* v. *Beers*, 24 N. Y. 178; *Thorp* v. *Keokuk Coal Co.*, 48 N. Y. 253. According to that view, the grantee, as soon as the mortgagee knows of the arrangement, becomes directly and primarily liable to the mortgagee for the debt for which the mortgagor was already liable to the latter, and the relation of the grantee and the grantor, towards the mortgagee, as

well as between themselves, is thenceforth that of principal and surety for the payment of the mortgage debt. Where such is held to be the relation of the parties, the consequence must follow that any subsequent agreement of the mortgagee with the grantee, without the assent of the grantor, extending the time of payment of the mortgage debt, discharges the grantor from all personal liability for that debt. *Calvo* v. *Davies*, 73 N. Y. 211; *Home National Bank* v. *Waterman*, 134 Illinois, 461, 467.

The case is thus brought within the well settled and familiar rule that if a creditor, by positive contract with the principal debtor, and without the consent of the surety, extends the time of payment by the principal debtor, he thereby discharges the surety; because the creditor, by so giving time to the principal, puts it out of the power of the surety to consider whether he will have recourse to his remedy against the principal, and because the surety cannot have the same remedy against the principal as he would have had under the original contract; and it is for the surety alone to judge whether his position is altered for the worse. 1 Spence Eq. Jur. 638; *Samuell* v. *Howarth*, 3 Meriv. 272; *Miller* v. *Stewart*, 9 Wheat. 680, 703. The rule applies whenever the creditor gives time to the principal, knowing of the relation of principal and surety, although he did not know of that relation at the time of the original contract; *Ewin* v. *Lancaster*, 6 B. & S. 571; *Oriental Financial Corporation* v. *Overend*, L. R. 7 Ch. 142, and L. R. 7 H. L. 348; *Wheat* v. *Kendall*, 6 N. H. 504; *Guild* v. *Butler*, 127 Mass. 386; or even if that relation has been created since that time. *Oakeley* v. *Pasheller*, 4 Cl. & Fin. 207, 233; *S. C.* 10 Bligh N. R. 548, 590; *Colgrove* v. *Tallman*, 67 N. Y. 95; *Smith* v. *Shelden*, 35 Michigan, 42.

In the case at bar, the mortgagee, immediately after the absolute conveyance by the mortgagors, was informed of and assented to that conveyance and the agreement of the grantee to pay the mortgage debt, and afterwards received interest on the debt from the grantee; and the subsequent agreement by which the mortgagee, in consideration of the payment of a sum of money by the grantee, extended the time of payment

of the debt, was made without the knowledge or assent of the mortgagors. Under the law of Illinois, which governs this case, the mortgagors were thereby discharged from all personal liability on the notes, and the Circuit Court rightly refused to enter a deficiency decree against them.

Decree affirmed.

NEW ORLEANS CITY AND LAKE RAILROAD COMPANY *v.* NEW ORLEANS.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 119. Argued December 4, 7, 1891. — Decided February 29, 1892.

An ordinance of a city, imposing, pursuant to a statute of the State, a license tax, for the business of running any horse or steam railroad for the transportation of passengers, does not impair the obligation of a contract, made before the passage of the statute, by which the city sold to a railroad company for a large price the right of way and franchise for twenty-five years to run a railroad over certain streets and according to certain regulations, and the company agreed to pay to the city annually a real estate tax, and the city bound itself not to grant, during the same period, a right of way to any other railroad company over the same streets.

THIS was a summary proceeding by the city of New Orleans against the New Orleans City and Lake Railroad Company, in a civil district court of the parish of Orleans, to collect a license tax of $2500 for the year 1887, imposed by an ordinance of the city, pursuant to the statute of Louisiana of 1886, c. 101, § 8, which provided "that for the business of carrying on, operating or running any horse or steam railroad, or both, for the transportation of passengers within the limits of any city or town in this State, the annual license shall be based on the annual gross receipts, as follows: viz.: First class — When the said annual gross receipts are five hundred thousand dollars, or in excess of that amount, the license shall be twenty-five hundred dollars." Acts of Louisiana of 1886, pp. 165, 175.

The defendant admitted that its annual gross receipts were more than $500,000; but contended that the statute and ordi-

nance, so far as they affected the defendant, were unconstitutional and void, as impairing the obligation of the following contracts:

On October 2, 1879, the city of New Orleans sold to the New Orleans City Railroad Company, for the price of $630,000, the right of way and franchises for running certain lines of street railroad for carrying passengers within the city until January 1, 1906, "to have and to hold the said right of way and franchises of the said railroad lines unto the said New Orleans City Railroad Company, its successors and assigns, transferees and vendees, for the full term and period hereinabove fixed;" and the company agreed to construct its railroad, to keep the streets in repair, and to comply with regulations as to the style and running of cars, the motive power, and the rates of fare, as therein provided, and to "annually pay into the city treasury, upon the assessed value of said road and fixtures, the annual tax levied upon real estate, the value of said road and fixtures to be assessed by the usual mode of assessment;" and the city bound itself "not to grant, during the period for which said franchises are sold, a right of way to any other railroad company upon the streets through which said right of way is hereby sold, unless by mutual agreement between the city and the purchaser or purchasers of these franchises."

On June 9, 1883, the liquidating commissioners of the New Orleans City Railroad Company, whose charter had expired, sold and transferred all that company's real and personal property, movable and immovable, right of way and franchises for the privilege of running street cars, to the defendant, by a contract by which, among other things, "said New Orleans City Railroad Company, having, according to law, paid its state and city licenses for 1883, amounting to twenty-five hundred dollars each, hereby transfers the unexpired term thereof, extending to December 31, 1883, to the present purchaser, the New Orleans City and Lake Railroad Company."

Judgment was given in favor of the city, and was affirmed on appeal by the Supreme Court of Louisiana. 40 La. Ann. 587. The defendant sued out this writ of error.

Mr. Charles F. Buck for plaintiff in error.

Gordon v. *Appeal Tax Court*, 3 How. 133, is so nearly parallel to the case at bar, that the difference between them is but nominal. In that case the question arose whether a banking franchise, having been obtained for valuable consideration, was subject to ordinary taxation. In this case it is attempted to impose a license tax — a license for revenue. We respectfully submit that, under the decision in that case the attempt in this involves an impairment of the obligation of the contract.

The city demands an increase in addition to the large price paid for our franchise, under penalty of stopping the plaintiff in error from exercising that franchise so conveyed to it. That this cannot be done, this court decided in that case. The point clearly and distinctly arose there, whether a franchise, for which a price was paid, could be taxed without impairing the obligation of the contract. The court answered the question in the negative.

In that case, as in this, the clamor was made, the franchise being property, why should it not be taxed like all property? This illusive theory was met by a practical and direct answer.

How much stronger than that case are the conditions of the one now under consideration. We are asked to pay a license annually, for doing that which we bought in express terms the right to do: "running cars and carrying passengers," etc., for hire, on tracks laid in the public streets; and we are asked to pay the license or be perpetually enjoined from exercising or using the privilege for which we paid, in cash, and in advance, for twenty-five years, the enormous sum of six hundred and thirty thousand dollars. This court will forbid the wrong, in the name of the Constitution of the United States, as it has consistently done whenever appealed to in a proper case.

Mr. W. B. Sommerville for defendant in error.

Mr. Justice Gray, after stating the facts as above, delivered the opinion of the court.

Exemption from taxation is never to be presumed. The legislature itself cannot be held to have intended to surrender the taxing power, unless its intention to do so has been declared in clear and unmistakable words. *Vicksburg &c. Railroad* v. *Dennis*, 116 U. S. 665, 668, and cases cited. Assuming, without deciding, that the city of New Orleans was authorized to exempt the New Orleans City Railroad Company from taxation under general laws of the State, the contract between them affords no evidence of an intention to do so. The franchise to build and run a street railway was as much subject to taxation as any other property.

In *Gordon* v. *Appeal Tax Court*, 3 How. 133, upon which the plaintiff in error much relied, the only point decided was that an act of the legislature, continuing the charter of a bank, upon condition that the corporation should pay certain sums annually for public purposes, and declaring that, upon its accepting and complying with the provisions of the act, the faith of the State was pledged not to impose any further tax or burden upon the corporation during the continuance of the charter, exempted the stockholders from taxation on their stock; and so much of the opinion as might, taken by itself, seem to support this writ of error, has been often explained or disapproved. *State Bank* v. *Knoop*, 16 How. 369, 386, 401, 402; *People* v. *Commissioners*, 4 Wall. 244, 259; *Jefferson Bank* v. *Skelly*, 1 Black, 436, 446; *Farrington* v. *Tennessee*, 95 U. S. 679, 690, 694; *Stone* v. *Farmers' Loan & Trust Co.*, 116 U. S. 307, 328.

The case at bar cannot be distinguished from that of *Memphis Gaslight Co.* v. *Shelby County*, in which this court upheld a license tax upon a corporation which had acquired by its charter the privilege of erecting gas works and making and selling gas for fifty years; and, speaking by Mr. Justice Miller, said: "The argument of counsel is that if no express contract against taxation can be found here, it must be implied, because to permit the State to tax this company by a license tax for the privilege granted by its charter is to destroy that privilege. But the answer is that the company took their charter subject to the same right of taxation in the

State that applies to all other privileges and to all other property. If they wished or intended to have an exemption of any kind from taxation, or felt that it was necessary to the profitable working of their business, they should have required a provision to that effect in their charter. The Constitution of the United States does not profess in all cases to protect property from unjust and oppressive taxation by the States. That is left to the state constitutions and state laws." 109 U. S. 398, 400.

The New Orleans City Railroad Company having had no right of exemption from the tax in question, it is unnecessary to consider whether such a right, had it existed, would have passed by the conveyance to the plaintiff in error. See *Chesapeake & Ohio Railway* v. *Miller*, 114 U. S. 176, 184, and cases cited; *Picard* v. *East Tennessee &c. Railroad*, 130 U. S. 637.

Judgment affirmed.

WATERMAN *v.* ALDEN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 455. Submitted January 8, 1892. — Decided February 29, 1892.

A testator, after giving the bulk of his property to his six brothers and sisters in equal shares, directed that "any and all notes, bills, accounts, agreements, or other evidences of indebtedness against any of my said brothers and sisters, held by me at the time of my decease, be cancelled by my said executors and delivered up to the maker or makers thereof, without payment of the same or any part thereof," except two notes specified, and secured by mortgage. *Held*, that this direction did not include joint and several notes made to the testator, between the date of the will and his death, by a partnership of which a brother was a member, to obtain money to carry on the business of the partnership, and secured by a conveyance of valuable property.

This was a bill in equity by Robert W. Waterman, a citizen of California, against Philander M. Alden and George S. Robinson, citizens of Illinois, and executors of James S.

Statement of the Case.

Waterman, to recover back certain sums of money alleged to have been paid by mistake.

James S. Waterman, for twenty years before his death, lived and did business as a banker in Sycamore, Illinois. He died on July 19, 1883, without children or descendants, and leaving an estate amply sufficient, without the sums claimed in this suit, to pay all debts, legacies and costs of administration.

By his last will, dated November 28, 1870, and admitted to probate September 18, 1883, he gave to his wife one-third of all his estate, real and personal; to other persons certain specific legacies of comparatively small amount; and all the residue of his estate, real and personal, to trustees in trust to pay the annual income for a term of twenty-one years to his six brothers and sisters, (of whom the plaintiff was one,) and at the end of that time to divide the principal in equal shares among them and the issue of any one deceased; and further provided as follows:

"7th. I desire and direct that any and all notes, bills, accounts, agreements, or other evidences of indebtedness against any of my said brothers and sisters, held by me at the time of my decease, be cancelled by my said executors and delivered up to the maker or makers thereof, without payment of the same or any part thereof, except two notes I hold against John C. Waterman, one for eight thousand dollars, dated August 10, 1870, and due January 1, 1871, and one for four thousand and six hundred dollars, dated November 28, 1870, and due six months after date, and both secured by trust deed upon lands in Johnson County, State of Missouri, which notes I desire and direct to be collected and equally divided between my said brothers and sisters, the child or children of a deceased brother or sister to take the same share the father or mother would have taken if living."

In accordance with the seventh clause of the will, the defendants delivered up to the plaintiff individual notes of his for from $12,000 to $15,000, and to John C. Waterman, another brother, his unsecured notes for about $30,000.

The real question in the case is whether that clause of the

Counsel for Appellant.

will applies to notes given by the plaintiff and another person to the testator under the following circumstances:

In 1881 the plaintiff, residing in San Bernardino, California, formed a mining partnership with one Porter, under the name of Waterman & Porter, in which the plaintiff's interest was three-fourths and Porter's one-fourth. On May 14, 1881, the plaintiff signed and gave to the testator, as security for the payment of any advances that he might make to the partnership, an agreement in writing to execute to him, within twelve months from date, on demand, a conveyance of twenty-four undivided hundredths of certain mining property in California, the estimated value of which at that time was, as the plaintiff testified, $1,000,000. The testator advanced to the partnership, for the development and working of the mines, between $25,000 and $30,000, part of which was repaid in his lifetime. At his death, he held five notes of the partnership, (which may be assumed to have been several as well as joint,) signed by the partnership name, amounting in all to $10,000, dated in the latter part of 1881, and payable in February or March, 1882, with interest at the rate of eight per cent annually. The partnership afterwards sent to the defendants, in payment of these notes, with interest, and of other debts of the partnership to the testator, drafts of a bank in San Francisco upon a bank in Chicago for $11,949.51, bought by the partnership, Porter contributing his share; and the defendants thereupon cancelled and returned these notes.

The plaintiff demanded of the defendants repayment of these sums, as having been paid in ignorance of the terms of the will, and under mistake of law and of fact. The defendants refused, because they were advised by counsel that by the will the only notes or evidences of indebtedness against the testator's brothers which were to be cancelled and delivered up were simply personal debts.

This bill in equity was thereupon filed, and, after a hearing before the Chief Justice on pleadings and proofs, was dismissed; and the plaintiff appealed to this court.

Mr. William R. Plum for appellant.

Counsel for Appellees.

The seventh clause of the will imports a legacy; it is not a testamentary act in the nature of a release. It is not a renunciation or abandonment of part of the estate, but a gift of part of the estate which the executors were not bound to collect and distribute for the sole reason that the death of the testator found already in the hands of the legatee what testator intended to give him. *Izon* v. *Butler*, 2 Price, 34; *Elliott* v. *Davenport*, 1 P. Wms. 83; *Toplis* v. *Baker*, 2 Cox Ch. 118; *Maitland* v. *Adair*, 3 Ves. Jr. 231.

The rule of construction is, that a bequest in general terms *prima facie* includes everything, capable of being comprehended under those terms, which the testator had power to dispose of. This is the fundamental and tacit assumption of courts in developing rules of construction. *Morrice* v. *Aylmer*, 44 Law Journ. Ch. 212.

The debt in question was the several debt of appellant to the testator. Rev. Stat. Illinois, c. 76, § 3; *Marine Bank* v. *Ferry*, 40 Illinois, 255; *Gage* v. *Mechanics' Nat. Bank*, 79 Illinois, 62; *People* v. *Harrison*, 82 Illinois, 84; *Byers* v. *Vincennes Nat. Bank*, 85 Illinois, 423; *Stearns* v. *Aguire et al.*, 6 California, 176; *People* v. *Love et al.*, 25 California, 520.

That the testator did not mean to confine his bequest to such debts as were secured only by the personal engagement of the debtor brother or sister, is shown by his specific exception of a debt of his brother John, which was secured by trust deed on land in Missouri. The express direction that that debt was to be collected, implies that in the mind of the testator his executors were not in any other case to have an action against any brother or sister.

A gift or legacy imports a bounty or personal benefit to the legatee. In addition to the gift of income made in section 4 the trustees are expressly directed to pay over his share to each legatee. Appellees' construction of the seventh section would necessarily, in certain obvious contingencies, impair the benefit bestowed in the fourth, and contradict the direction to pay over. *Bates* v. *Hillman*, 43 Barb. 645.

Mr. John P. Wilson for appellees.

Opinion of the Court.

MR. JUSTICE GRAY, after making the foregoing statement, delivered the opinion of the court.

The matter to be ascertained in this case is the intention of the testator as manifested on the face of his will, by which, after making provision for his widow, and some inconsiderable legacies, he devises and bequeaths the bulk of his property to be distributed among his brothers and sisters in equal shares, and then, as incidental to his general scheme of distribution, directs "that any and all notes, bills, accounts, agreements or other evidences of indebtedness against any of my said brothers and sisters held by me at the time of my decease be cancelled by my said executors and delivered up to the maker or makers thereof, without payment of the same or any part thereof," except two notes held by the testator against John C. Waterman alone, amounting to $12,600, secured by trust deed upon lands in Missouri, which he directs to be collected and divided among his brothers and sisters.

The manifest object of the clause is to benefit brothers and sisters of the testator, and them only. The testator clearly expresses his intention that (with the exception specified) any sums of money, which may be owing by any of them to him at the time of his death, shall not be collected, or be treated as part of his estate for the purpose of division among them, but that all notes, bills, accounts, agreements or other evidences of such debts shall be cancelled and delivered up. The terms of the exception may affirm or imply an intention to include in the general provision debts of a brother or of a sister for which he holds security; but they have no tendency to show that sums of money owing from any other person are intended to be released or given to such person, or to be excluded from the estate to be distributed among the brothers and sisters.

Taking the words of the clause, in connection with the general scheme of the will, it is impossible to attribute to the testator an intention to include joint and several notes made to him, between the date of the will and his death, by a partnership of which one brother is a member, to obtain money to carry on the business of the partnership, and secured by an

agreement to convey real estate. To hold that the brother alone was discharged from liability, while his partner remained liable to the estate, upon such notes, would be inconsistent with the positive direction that all notes coming within the scope of the clause shall be cancelled by the executors "and delivered up to the maker or makers thereof, without payment of the same or any part thereof." To hold that there was a legacy of the whole of such notes to the brother, with a right to compel payment of a share thereof by his partner, would be equally inconsistent with that direction, and would moreover give to the brother alone, instead of to him together with the other brothers and sisters, the share of the debt for which the stranger was ultimately liable. To hold that such notes should be cancelled and extinguished as against both makers, the brother and his partner, would contravene the testator's manifest purpose to benefit brothers and sisters only; for to release the stranger from his share of the debt would not only confer no benefit upon the brother, but would injure him in common with the other brothers and sisters by diminishing the estate to be divided among them.

The case is quite different from a legacy to a particular person of "his bond" for a sum named, which must, of course, pass a joint bond, when there is no other, as in the cases, cited by the appellant, of *Maitland* v. *Adair*, 3 Ves. 231, and *Izon* v. *Butler*, 2 Price, 34.

The decisions upon contracts to secure debts of a particular person are, to say the least, not inconsistent with this conclusion. A contract of guaranty or suretyship, by which one person undertakes to be responsible for debts to be contracted by another, does not ordinarily include debts contracted by the latter jointly with a third person, as partners or otherwise. *Bellairs* v. *Ebsworth*, 3 Camp. 52; *London Assurance Co.* v. *Bold*, 6 Q. B. 514; *Montefiore* v. *Lloyd*, 15 C. B. (N. S.) 203; *Leathley* v. *Spyer*, L. R. 5 C. P. 595, 602; *Palmer* v. *Bagg*, 56 N. Y. 523; *Parham Sewing Machine Co.* v. *Delano*, 113 Mass. 194, 197; *White Sewing Machine Co.* v. *Hines*, 61 Mich. 423. Even when a man gives security for debts which he may himself contract, opinions have differed upon the ques-

tion whether it does or does not include debts contracted by him as a member of a partnership. *Ex parte Freen*, 2 Glyn & J. 246; *Chuck* v. *Freen*, Mood. & Malk. 259; *Ex parte McKenna*, 3 DeG. F. & J. 629; *Buffalo Bank* v. *Thompson*, 121 N. Y. 280; *Hallowell* v. *Blackstone Bank*, 154 Mass. 359.

For these reasons, we concur in the opinion delivered by the Chief Justice in the Circuit Court, that the seventh clause of the will, whether operating by way of release or by way of legacy, cannot be construed as including the joint and several notes of Waterman & Porter, or any part thereof.

Decree affirmed.

In re WOODS, Petitioner.

ORIGINAL.

No number. Submitted January 18, 1892. — Decided February 29, 1892.

The questions (1) whether it is settled law in the State of Minnesota that a judgment of dismissal in a former suit, such as is pleaded in this case, was not a bar to a second suit on the same cause of action; (2) whether the law in respect of recovery by a servant against his master for injuries received in the course of his employment was properly applied on the trial of a case, do not fall within the category of questions of such gravity and general importance as to require the review of the conclusions of the Circuit Court of Appeals in reference to them.

THIS was an application for a writ of *certiorari* to the United States Circuit Court of Appeals for the Eighth District. The court stated the case as follows:

This was an action brought by August Lindvall in the Circuit Court of the United States for the District of Minnesota against John Woods and Stephen B. Lovejoy, partners as Woods & Lovejoy, to recover for a personal injury alleged to have been caused through the negligence of the defendants. The issues were a general denial and the plea of former adjudication.

Statement of the Case.

The case was twice tried, and upon the first trial the plea of former adjudication was sustained, but a new trial was granted for the reasons given in the opinions of Mr. Justice Miller and Judge Nelson, reported in 47 Fed. Rep. 195. The second trial resulted in a verdict and judgment for the plaintiff for $3800, and costs taxed at $142.50, and a motion for new trial having been overruled, the case was taken by writ of error to the Circuit Court of Appeals for the Eighth Circuit.

In the Circuit Court it was contented, on the merits, that the rule which precludes a servant from recovering from his master for an injury received through the negligence of fellow-servants was applicable, and upon the conclusion of the evidence the defendants moved the court to instruct the jury to return a verdict for them on the ground that the plaintiff had failed to make out a cause of action, which motion was denied, exception taken, and the ruling assigned for error. The Circuit Court of Appeals held that the rule invoked did not apply, and that the verdict was sustained by the evidence. (4 U. S. App. 49.)

From the bill of exceptions it appeared that to sustain their plea of a former adjudication, the defendants offered in evidence a duly certified transcript of record, which showed the following facts:

"That the same plaintiff had brought an action against the same defendants, upon exactly the same cause, for the same injury, in the District Court of the State of Minnesota for the county of Hennepin, a court of general jurisdiction in said State.

"That upon the trial of said cause in said District Court, after the plaintiff had put in all his evidence and rested his case, the defendants moved said District Court to dismiss said action upon the ground that the evidence of plaintiff did not make out a case against said defendants; which motion, after due and solemn argument by both defendants and plaintiff and upon due consideration, was granted by said District Court and said action was dismissed.

"That thereupon the plaintiff procured a stay of proceedings and made up and procured to be settled and signed by the judge who tried the case a settled case and exceptions containing all the evidence, and upon the pleadings and such settled case made a motion for a new trial in said District Court; that said motion for a new trial, after due hearing and consideration, was denied by said District Court.

"That thereupon said plaintiff, under the practice and procedure in the Minnesota courts in such cases, appealed to the Supreme Court of Minnesota from said order denying the motion for a new trial and carried to the Supreme Court upon such appeal the pleadings and all the evidence given in the court below.

"That the case upon said appeal was duly heard and tried in said Supreme Court, and the decision and order of said District Court was by said Supreme Court duly and in all things affirmed.

"That thereupon a mandate issued from said Supreme Court to said District Court for further proceedings in accordance with such decision, and upon the filing of said mandate judgment in said cause was given and entered in said District Court as follows, to wit:

(Omitting title and recitals.)

"Now, on motion of Messrs. Shaw & Cray, attorneys for said defendants, it is ordered and adjudged that said action be, and hereby is, dismissed, and that said defendants do have and recover of said plaintiff the sum of seven and $\frac{68}{100}$ dollars for their costs and disbursements of said action duly taxed and allowed herein."

To the admission of this transcript in evidence plaintiff objected, the objection was sustained, the transcript excluded, and defendants duly excepted.

The Circuit Court of Appeals held that the effect of the judgment of the state court dismissing, on the defendants' motion, an action brought in that court, at the conclusion of plaintiff's testimony, upon the ground that the plaintiff had failed to make out a case, was a question of local law depend-

ing on the construction of the statute of the State, and that the established doctrine of the Supreme Court of Minnesota was that under the statute such judgment of dismissal was not a judgment upon the merits of the action which would bar the plaintiff from maintaining another suit for the same cause, but that it was in effect nothing more than a common law or voluntary non-suit; that this construction by the Supreme Court of the State should be followed by that court; and, therefore, that the record of the judgment of dismissal constituted no bar to the action and was rightly excluded.

Judgment of affirmance having been rendered by the Circuit Court of Appeals, the mandate was stayed in order to enable plaintiffs in error to make application to this court for a writ of *certiorari* in the cause, and that application was accordingly made, upon notice, and accompanied by a certified copy of the entire record of the case, in compliance with the rule.

Mr. Willard R. Cray for the petitioners.

Mr. John W. Arctander and *Mr. John Lind* opposing.

Mr. Chief Justice Fuller delivered the opinion of the court.

In *Lau Ow Bew, Petitioner*, 141 U. S. 583, it was held that the power of this court to require a case in which the judgment and decree of the Circuit Court of Appeals is made final, to be certified for review and determination, as if it had been brought here on appeal or writ of error, could only be properly invoked under section six of the act of Congress entitled "An act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, (26 Stat. 826, 828, c. 517,) when questions of gravity and importance were involved.

This must necessarily be so in any view, and especially when it is considered that the Circuit Courts of Appeals were created for the purpose of relieving this court of the oppres-

sive burden of general litigation, which impeded the examination and disposition of cases of public concern, and delayed suitors in the pursuit of justice.

But in the interest of jurisprudence and uniformity of decision, to use the language of the eminent jurist and statesman who had charge of the bill, provision was made under section six for such supervision on our part as would tend to avert diversity of judgments and guard against inadvertence of conclusion in controversies involving weighty and serious matters.

In the matter of *Lau Ow Bew*, the construction of acts of Congress in the light of treaties with a foreign government, and the status of domicil in respect of natives of one country domiciled in another, a matter of international concern, were brought under consideration upon the record, and we were of opinion that the grounds of the application were sufficient to call for our interposition.

But we do not regard the inquiry as to whether it was settled law in the State of Minnesota that a judgment of dismissal in a former suit, such as pleaded here, was not a bar to a second suit upon the same cause of action, or whether the law in respect of recovery by a servant against his master for injuries received in the course of his employment was properly applied on the trial of this case, as falling within the category of questions of such gravity and general importance as to require the review of the conclusions of the Circuit Court of Appeals in reference to them.

The writ of certiorari is denied.

HORNER v. UNITED STATES. No. 1.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 1051. Argued January 13, 14, 1892. — Decided February 29, 1892.

Under § 3894 of the Revised Statutes, as amended by the act of September 19, 1890, c. 908, (26 Stat. 465,) in regard to the carriage of lottery matter in the mail, it is an offence to cause a lottery circular, mailed at the city of New York, and addressed there to a person in Illinois, to be delivered to such person in Illinois, by mail, and an indictment for so doing is triable in Illinois.

The statute is constitutional, under the decision in *Ex parte Rapier*, *ante*, 110.

Where a person is committed in one district, by a United States commissioner, for trial in another, the question of his identity cannot be reviewed on *habeas corpus*.

THIS was an appeal from a judgment of the Circuit Court, dismissing a writ of *habeas corpus*. The case is stated in the opinion.

Mr. Alfred Taylor for appellant. *Mr. Frederick S. Parker* and *Mr. Herman Aaron* were with him on the brief.

Mr. Solicitor General for the appellees.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

On the 13th of January, 1891, an indictment was found by a grand jury of the District Court of the United States for the Southern District of Illinois, against Edward H. Horner, charging that, on December 28, 1890, he unlawfully and knowingly deposited and caused to be deposited, in the post office at New York, in the State of New York, "a certain circular containing a list of prizes awarded at the drawing of a lottery, which said circular was then and there numbered 538, and purported to be issued from the banking-house of

E. H. Horner, at 88 Wall street, and was dated at New York, December 27, A.D. 1890, and was then and there addressed to Mrs. M. Schuchman, 624 Illinois St., Belleville, Ill., in said district, and was then and there carried by mail for delivery to said Mrs. M. Schuchman, at 624 Illinois street, in Belleville, Illinois, in said district, according to the said direction thereon."

There was a 2d count, charging Horner with having, on December 30, 1890, unlawfully and knowingly deposited, and caused to be deposited, in the post office at New York, in the State of New York, a certain circular containing lists of prizes awarded at the drawings of certain specified lotteries, "which said circular was then and there enclosed in a sealed envelope, duly stamped with postage stamps for the amount of postage required thereon by law, and was then and there addressed, upon the outside of said envelope, to Mrs. M. Schuchman, 624 Illinois St., Belleville, Illinois, in said district, and was then and there, after being so deposited in the post office as aforesaid, carried by mail for delivery to said Mrs. M. Schuchman, at 624 Illinois street, in Belleville, Illinois, in said district, according to the direction thereon."

A 3d count charged that Horner, on December 28, 1890, unlawfully and knowingly deposited, and caused to be deposited, in the post office at New York, in the State of New York, a certain circular containing a list of prizes awarded at the drawing of a specified lottery, "which said circular was then and there addressed to Mrs. M. Schuchman, 624 Illinois St., Belleville, Ill., in said district, and was then and there carried by mail for delivery to said Mrs. M. Schuchman, 624 Illinois street, in the State of Illinois, and in said district, according to the direction on said circular when it was so deposited in the post office at New York by said Edward H. Horner, as aforesaid."

A 4th count charged that Horner, on December 29, 1890, unlawfully and knowingly deposited, and caused to be deposited, in the post office at New York, in the State of New York, "a certain printed publication having a caption of the tenor following, viz., 'banking-house of E. H. Horner, No. 88 Wall street,' bearing date at New York on the 27th day of Decem-

ber, A.D. 1890, and numbered 538, containing a list of prizes awarded at the drawing of a lottery; which said publication was then and there enclosed in a sealed envelope, duly stamped with postage stamps, and was addressed to Mrs. M. Schuchman, 624 Illinois St., Belleville, Ill., in said district, and was then and there carried by mail, after being so deposited as aforesaid, for delivery to Mrs. M. Schuchman, 624 Illinois street, Belleville, Illinois, in said district, according to said direction thereon."

A 5th count charged that Horner, on the 31st of December, 1890, within said Southern District of Illinois, unlawfully and knowingly, did "cause to be delivered by mail to Mrs. M. Schuchman, 624 Illinois St., at Belleville, in the State of Illinois, and in said district, a certain circular containing a list of prizes awarded at the drawing of a lottery in two-and-a-half per cent city of Antwerp bonds of 1887, at Antwerp, on the 10th day of November, A.D. 1890; which said circular was then and there numbered 538, and had a caption printed thereon, in substance, as follows, viz., 'banking-house of E. H. Horner, No. 88 Wall street,' and was dated on the 27th day of December, A.D. 1890; which said circular he, the said Edward H. Horner, theretofore, to wit, on the 29th day of December, A.D. 1890, did knowingly deposit, and cause to be deposited, in the post office at New York, in the State of New York, addressed to said Mrs. M. Schuchman, at 624 Illinois St., in Belleville, in the State of Illinois, and which said circular was then and there carried by mail for delivery to said Mrs. M. Schuchman, 624 Illinois street, at Belleville, in the State of Illinois, according to said direction so upon said circular, as aforesaid."

That indictment was founded on § 3894 of the Revised Statutes of the United States, as amended by the act of September 19, 1890, c. 908, 26 Stat. 465, which reads as follows: "No letter, postal card or circular concerning any lottery, so-called gift concert, or other similar enterprise offering prizes dependent upon lot or chance, or concerning schemes devised for the purpose of obtaining money or property under false pretences, and no list of the drawings at any lottery or similar

scheme, and no lottery ticket or part thereof, and no check, draft, bill, money, postal note or money order for the purchase of any ticket, tickets or part thereof, or of any share or any chance in any such lottery or gift enterprise, shall be carried in the mail or delivered at or through any post office or branch thereof, or by any letter carrier; nor shall any newspaper, circular, pamphlet or publication of any kind containing any advertisement of any lottery or gift enterprise of any kind offering prizes dependent upon lot or chance, or containing any list of prizes awarded at the drawings of any such lottery or gift enterprise, whether said list is of any part or of all of the drawing, be carried in the mail or delivered by any postmaster or letter carrier. Any person who shall knowingly deposit or cause to be deposited, or who shall knowingly send or cause to be sent, anything to be conveyed or delivered by mail in violation of this section, or who shall knowingly cause to be delivered by mail anything herein forbidden to be carried by mail, shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine of not more than five hundred dollars or by imprisonment for not more than one year, or by both such fine and imprisonment for each offence. Any person violating any of the provisions of this section may be proceeded against by information or indictment and tried and punished, either in the district at which the unlawful publication was mailed or to which it is carried by mail for delivery according to the direction thereon, or at which it is caused to be delivered by mail to the person to whom it is addressed."

On the 15th of January, 1891, a post office inspector made a complaint on oath before John A. Shields, a United States commissioner for the Southern District of New York, founded on the said indictment, and on a bench warrant issued thereon by the judge of the District Court of the United States for the Southern District of Illinois, asking for the arrest of Horner. Commissioner Shields thereupon, on the same day, issued a warrant to the marshal of the United States for the Southern District of New York, for the arrest of Horner and the bringing of him before the said commissioner. Horner was arrested and brought before the commissioner. He de-

manded an examination respecting the charge, and in default of $5000 bail, was committed to the custody of the marshal, to be thereafter brought up for examination. The examination took place before the commissioner, and was attended by counsel for the government and for Horner, with the result, that the commissioner committed him to the custody of the marshal to await a warrant for his removal by the District Judge of the United States for the Southern District of New York, the commissioner certifying that it appeared to him, from the testimony offered, that Horner was the person charged in the warrant, and that there was probable cause for believing him guilty of the offence charged, and that he was thereby committed for trial at the Southern District of Illinois.

The District Judge of the United States for the Southern District of New York issued a warrant to the marshal for that district, to remove Horner to the Southern District of Illinois, "to be tried in said district upon such counts in the indictment now pending in said district as the said Edward H. Horner can be legally tried upon." In issuing that warrant, the District Judge delivered an opinion, (44 Fed. Rep. 677,) basing his decision upon the ground that the fifth count of the indictment charged an offence which was not, and could not be, completed without the delivery of the matter by mail to the person to whom it was addressed; that such offence consisted, under the third clause of the statute, in knowingly causing the prohibited matter to be delivered by mail; that, under the fifth count, although the voluntary act began in New York, by deposit in the mail, the offence of causing the delivery by mail could not be consummated except by delivery to the person and at the place intended; that, in whatever way Horner might have caused such delivery to be made, either by deposit in the mail at New York or elsewhere, and wherever his voluntary act might have begun, the offence under the third clause of the statute, charged in the fifth count of the indictment, was not committed until the delivery by mail was made; that, when such delivery was made, the offence was committed, and was committed at the

place where the delivery was made, in accordance with the intent of Horner and by his procurement, although it might perhaps also be deemed to have been committed at the place of deposit; and that the offence charged in the fifth count was, therefore, triable in Illinois, under the Constitution of the United States as well as § 731 and § 3894 of the Revised Statutes, as amended; citing *In re Palliser*, 136 U. S. 257.

Section 731 of the Revised Statutes of the United States reads as follows: "When any offence against the United States is begun in one judicial circuit and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined, and punished in either district, in the same manner as if it had been actually and wholly committed therein." The words "judicial circuit" in that section are probably printed by a clerical error for "judicial district," as, in § 30 of the act of March 2, 1867, c. 169, 14 Stat. 484, from which § 731 is taken, the words are "judicial district."

On the same day on which the warrant of removal was issued, Horner presented a petition to the Circuit Court of the United States for the Southern District of New York, setting forth, in substance, the foregoing facts, and praying for a writ of *habeas corpus* to the marshal and for a writ of certiorari to the commissioner. The writs were issued, Horner was brought before the Circuit Court, and the commissioner made a return to the writ of certiorari. The Circuit Court, held by Judge Lacombe, dismissed the writ of *habeas corpus* and remanded Horner to the custody of the marshal; and afterwards, on its order, he was released on $2500 bail, pending an appeal by him to this court, which appeal was duly allowed, and perfected, and the record filed in this court, prior to the passage of the Circuit Courts of Appeals act of March 3, 1891, c. 517, 26 Stat. 826. Therefore, no question arises as to the jurisdiction of the appeal by this court.

The appellant has filed 23 assignments of error, 13 of which attack the sufficiency of the counts of the indictment, 6 of them allege that the warrant of removal, if executed, will deprive Horner of the right secured to him by article 3, § 2,

of the Constitution of the United States, and the 6th Amendment to said Constitution, to be tried in the State and district wherein the crime was committed; one of them alleges that the warrant of removal is so indefinite and uncertain as not to apprise Horner of the nature of his offence, and so violates the 6th Amendment to the Constitution; one of them alleges that the Horner who is in custody is not the person charged in the indictment; and the remaining 2 are of a general character, assigning no special ground of error.

The point is taken for Horner that § 3894 of the Revised Statutes, as amended by the act of September 19, 1890, is unconstitutional and void, as being in violation of the 1st Amendment to the Constitution, which provides that "Congress shall make no law . . . abridging the freedom of speech or of the press." But this question was disposed of by the decision of this court recently made in *Ex parte Rapier*, *ante*, 110.

It is further urged, that Horner is held for trial in the Southern District of Illinois, for acts committed in the Southern District of New York. But we agree with the District Judge in his opinion that, whatever may be said of the first 4 counts of the indictment, the 5th count is good, for the reasons stated by him. That count distinctly alleges that Horner unlawfully and knowingly caused to be delivered by mail, to Mrs. Schuchman, at Belleville, in the State of Illinois, and in the Southern District of Illinois, a certain circular containing a list of prizes awarded at the drawing of the lottery specified in that count. The allegation of the count, that such circular had been knowingly deposited, and caused to be deposited, by Horner, in the post office at New York, addressed to Mrs. Schuchman at Belleville, Illinois, and that such circular was then and there carried by mail for delivery to her at said Belleville, according to the direction so upon it, is inserted merely to show how the circular came to be in the mail; but the gravamen of the charge is, that Horner unlawfully and knowingly caused the circular to be delivered by mail to Mrs. Schuchman, at Belleville, Illinois, in the Southern District of Illinois.

It is made a distinct offence in § 3894, as amended, knowingly to cause to be delivered by mail anything forbidden by the statute to be carried by mail; and the same section declares, that no circular concerning any lottery or other similar enterprise offering prizes dependent upon lot or chance, and no list of the drawings at any lottery or other similar scheme, shall be carried in the mail. The last clause of § 3894, as amended, provides that any offender may be indicted, tried and punished either in the district at which the unlawful publication was mailed, or to which it is carried by mail for delivery according to the direction thereon, or at which it is caused to be delivered by mail to the person to whom it is addressed. The distinct and separate crime charged in the 5th count of the indictment was committed in the Southern District of Illinois, and is triable there. This is fully shown by the case of *In re Palliser*, 136 U. S. 257.

The District Judge, in exercising his jurisdiction, under § 1014 of the Revised Statutes, to issue a warrant for the removal of Horner to the Southern District of Illinois, had a right to determine whether or not the offence was within the jurisdiction of the District Court of the United States for that district, and that determination was reviewable by *habeas corpus*. *Callan* v. *Wilson*, 127 U. S. 540.

Objection is also made to the language of the warrant of removal, in that it directs the marshal to remove Horner to the Southern District of Illinois, "to be tried in said district upon such counts in the indictment now pending in said district as the said Edward H. Horner can be legally tried upon." It is urged that, notwithstanding this language, the warrant puts Horner upon trial in the Southern District of Illinois upon the whole indictment, and that it is void for indefiniteness, and does not inform Horner of the nature and cause of the accusation against him.

We do not think there is any force in either of these objections. If Horner should be put upon trial in Illinois upon all the counts of the indictment, he can demur to any of them, and thus have it determined which of the counts he shall meet. The 5th count is sufficiently specific, and the deter-

mination in the warrant of removal is only that there is at least one count of the indictment upon which Horner may be tried in Illinois. That is quite sufficient.

The question of the identity of Horner was a question of fact, which the United States commissioner had full jurisdiction to decide, for the purpose of removal; and his decision will not be reviewed on *habeas corpus*. *In re Cortes*, 136 U. S. 330; *Stevens* v. *Fuller*, 136 U. S. 468.

The fact that one of the witnesses before the commissioner stated "that the person now in custody is Edward H. Horner, of the city of New York," serves only to confirm his identity with the person charged in the indictment, because it is alleged therein, and particularly in the 5th count, that the circular was deposited in the post office at New York, and purported to come from the banking-house of Horner in that city.

The order of the Circuit Court, dismissing the writ of *habeas corpus* and remanding the accused, is

Affirmed.

LAWRENCE v. NELSON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 1067. Submitted November 24, 1891. — Decided February 29, 1892.

An administrator, appointed in one State, who, after appearing and having judgment rendered against him as such in a suit in equity brought in another State, the laws of which authorize a foreign administrator to sue there, files a bill of review in the same court to reverse the decree, for the reason that, not being an administrator appointed by the courts of that State, he could not be sued there, is bound by the original judgment against him, if his bill of review is dismissed for want of equity.

The general equity jurisdiction of the Circuit Court of the United States to administer, as between citizens of different States, the assets of a deceased person within its jurisdiction cannot be defeated or impaired by laws of a State undertaking to give exclusive jurisdiction to its own courts.

Statement of the Case.

THIS was a bill in equity, filed September 12, 1889, in the Circuit Court of the United States for the Northern District of Illinois, by William H. Nelson, a citizen of Indiana, and George M. French, a citizen of Arkansas, against Edward F. Lawrence, a citizen of Illinois, "as administrator of the estate of David Ballentine, deceased, and in his own right," seeking to charge him as administrator appointed in Illinois with the amount of a judgment recovered against him in the Circuit Court of the United States for the Eastern District of Arkansas. The material allegations of the bill were as follows:

That on May 10, 1878, David Ballentine died at Hot Springs in Arkansas, leaving a large real and personal estate, and a paper purporting to be his last will and testament, which was soon after admitted to probate, and letters testamentary issued to an executor named in the will, by the county court of Lake County in the State of Illinois; that on January 10, 1880, that court set aside the will and probate, and recalled the letters testamentary, and appointed Edward F. Lawrence "as administrator of the estate of the said David Ballentine, deceased," and he forthwith qualified as such, and took possession of the personal property; that the estate was abundantly solvent, and that all debts except the plaintiffs' had been paid in full.

That the plaintiffs were partners with David Ballentine in his lifetime in business at Hot Springs, and on November 27, 1878, brought a suit in equity in the Circuit Court of the United States for the Eastern District of Arkansas for the purpose of settling up the partnership accounts, and of securing from his estate the moneys justly due them; that in that suit the executor was duly served with process and entered an appearance, and that when the letters testamentary were recalled and Lawrence appointed administrator, as above stated, "the said Edward F. Lawrence, as administrator as aforesaid, was duly substituted as defendant in said suit instead of" the executor, "and said Lawrence thereupon duly appeared in said court and thereafter conducted said suit for said estate;" that on July 25, 1882, that court entered a final decree that "Edward F. Lawrence as administrator of David Ballentine, deceased," was indebted to the plaintiffs severally in the sum of

$1574.45, with interest, for their several shares of profits of the partnership received and held by Ballentine before his death, and should pay the same to them "out of the assets of the estate of said David Ballentine in his hands remaining to be administered," with costs; and that the defendant filed a petition for a rehearing, which was overruled on November 30, 1883.

That on January 24, 1884, the defendant, seeking, with the consent and connivance of the heirs, to embarrass and defeat the plaintiff and to avoid the payment of said decree, falsely and fraudulently represented to the county court of Lake County that all debts and claims against the estate had been paid and the estate had been distributed among the lawful heirs, and thereby obtained from that court an order declaring a final settlement of the estate and discharging him as administrator.

That on November 3, 1884, the defendant, "as administrator of said estate, filed in said United States Circuit Court for the Eastern District of Arkansas his bill of review against the plaintiffs, in which said Lawrence set out the decree recovered by the plaintiffs against him in said court as aforesaid, and that the plaintiffs were about to proceed against him for the recovery of the moneys therein mentioned in the State of Illinois, and in said bill of review prays that, until the matters in said bill of review contained could be inquired into, the plaintiffs might be restrained by said court from prosecuting said decree or proceeding in any manner to collect the moneys therein mentioned, and that said original decree so recovered by the plaintiffs might be reviewed and reversed for the reasons: 1st. That the facts upon which said decree was rendered were false and contrary to the evidence. 2d. Because said decree was rendered against said Lawrence without service of process upon him or notice to him, or without any opportunity on his part to make defence thereto. 3d. Because of newly discovered evidence by said Lawrence in support of the defence to said suit. 4th. Because said Lawrence, being an administrator appointed not by the courts of Arkansas, but by the courts of Illinois, could not be sued in Arkansas."

That the plaintiffs, "as soon as said bill of review was filed and they received notice thereof, desisted and refrained from proceeding to collect said decree until the matters in said bill of review set out could be passed upon by said court, and to that end they appeared in said court and filed their answer to said bill of review, and the plaintiffs as expeditiously as possible caused said bill of review to be brought to a hearing, and upon such hearing, and on or about April 16, 1888, said Circuit Court for the Eastern District of Arkansas dismissed said bill of review for want of equity, by reason whereof the said original decree so recovered as aforesaid by the plaintiffs against said Lawrence remains in full force and effect, and the plaintiffs are advised that they are entitled to recover from said Lawrence and said estate the amounts therein decreed to the plaintiffs, with interest and costs of said suit."

That the plaintiffs did not appear or present their claim in the Lake County court, nor in any way become parties to its proceedings, nor receive any notice thereof, or of the defendant's intention to obtain a final settlement and discharge in that court, until more than two years after the order had been entered; and that the defendant "purposely avoided giving the plaintiffs notice of said intended application, and intentionally suppressed from the plaintiffs the knowledge of the said settlement and discharge, for the purpose of carrying out his said fraudulent scheme and purpose to defeat the plaintiffs in the collection of their said debts;" and that the defendant, while falsely claiming to have paid out and distributed the estate according to the order of the county court, still retained in his hands, with the connivance of the heirs and distributees, sufficient assets to pay and satisfy the decree obtained by the plaintiffs against him as aforesaid.

The bill prayed for an account, for payment of the plaintiffs' claim out of the assets of the deceased, or, if he had not now sufficient assets, but had paid them out since he had notice of their suit in the Circuit Court of the United States for the Eastern District of Arkansas, that he might be adjudged guilty of a *devastavit*, and be decreed to pay to the plaintiffs *de bonis propriis* the sums mentioned in the decree in that suit, and for further relief.

Statement of the Case.

A demurrer to the bill for want of equity was heard before Mr. Justice Harlan and the Circuit Judge, and overruled, according to the opinion of the presiding justice. The defendant elected to stand by his demurrer; and admitted in open court that at the time of the entry of the decree of July 25, 1882, he, as administrator appointed in Illinois, had assets in his hands, after paying all other creditors, sufficient to satisfy that decree, and had since distributed those assets among the next of kin. A final decree was thereupon entered that the defendant pay to each of the plaintiffs the sum of $3136.67 and costs.

The defendant appealed to this court; and the judges certified that they were opposed in opinion upon several questions of law, substantially embodied in the following:

"1st. Whether it was competent for the administrator of David Ballentine, appointed under the laws of Illinois, to appear in the suit brought in the Circuit Court of the United States for the Eastern District of Arkansas by the plaintiffs herein, and submit himself to the jurisdiction of that court in respect to the matters involved in that suit?"

"6th. Whether the decree of July 25, 1882, recited in the bill, is void, simply because it was rendered against an administrator appointed in Illinois, voluntarily appearing therein and submitting himself to the jurisdiction of the court rendering the decree?

"7th. Did the decree of the Circuit Court of the United States for the Eastern District of Arkansas, rendered July 25, 1882, bind the defendant as the administrator of David Ballentine, deceased, appointed under the laws of Illinois, and the assets of the estate of said decedent in the State of Illinois in his hands as administrator, in the sense that the defendant was bound to pay said decree without further action against him or said estate by the plaintiffs, and, having settled said estate in and under the order of the county court of Lake County, Illinois, and obtained his discharge as such administrator from said county court without having paid said decree, is he, the defendant, now liable in this action?

"8th. Even if the decree of July 25, 1882, aforesaid was

not binding in the sense last above mentioned, did the said decree become binding, in the sense last above mentioned, by reason of and upon the rendition of the decree of the Circuit Court of the United States for the Eastern District of Arkansas on or about April 16, 1888, dismissing the bill of review in the plaintiffs' bill mentioned?"

Mr. Henry A. Gardner and *Mr. Willian McFadon* for appellant.

The statue of limitations of Illinois, as to filing claims against the estate of a deceased person, binds a non-resident creditor. *Morgan* v. *Hamlet*, 113 U. S. 449.

It was not competent for the appellant as administrator by the appointment of the county court of Lake County, Illinois, to appear in the suit of appellees, brought in the Circuit Court of the United States for the Eastern District of Arkansas, and submit himself to the jurisdiction of that court. *Judy* v. *Kelly*, 11 Illinois, 211; *S. C.* 50 Am. Dec. 455; *McGarvey* v. *Darnall*, 134 Illinois, 367; *Durrie* v. *Blauvelt*, 49 N. J. Law (20 Vroom) 114; *Caldwell* v. *Harding*, 5 Blatchford, 501.

The rule is uniform that no action can be maintained against an administrator, founded on a debt due from the estate of the decedent, unless such administrator has been qualified by a probate tribunal in the state and county where the suit is brought. *Caldwell* v. *Harding*, 5 Blatchford, 501; *Vaughan* v. *Northup*, 15 Pet. 1; *Mellus* v. *Thompson*, 1 Cliff. 125; *Kerr* v. *Moon*, 9 Wheat. 565; *Peale* v. *Phipps*, 14 How. 368; *Judy* v. *Kelly*, 11 Illinois, 211; *S. C.* 50 Am. Dec. 455.; *Aspden* v. *Nixon*, 4 How. 467; *Johnson* v. *Powers*, 139 U. S. 159; *Low* v. *Bartlett*, 8 Allen, 259.

Suppose that the appellant had been appointed by proper legal authority, and by one of the probate courts within the State of Arkansas, administrator of the estate of David Ballentine, deceased, and the same decree of July 25, 1882, had been recovered against him in the Circuit Court of the United States for the Eastern District of Arkansas, it is clear that such decree of July 25, 1882, would have no binding effect

upon the assets being administered by appellant as administrator under appointment by one of the probate courts of Illinois, and that such decree rendered by the Circuit Court of the United States, for the Eastern District of Arkansas would not have been evidence against appellant as administrator in Illinois of any debt, and that, notwithstanding such decree of July 25, 1882, against him as an Arkansas administrator, the appellees, had they sued in Illinois, must have sued appellant as administrator in the courts of Illinois, not upon the said decree, but upon the original cause of action on which the said decree was recovered.

Now, it being the fact that appellant never was appointed administrator by any court of Arkansas, can it be logically contended that the decree of July 25, 1882, rendered against him in Arkansas, should have any greater force against him as administrator appointed by and administering the estate of David Ballentine, deceased, in the county court of Lake County, Illinois, than the same decree would have had, had he been properly appointed administrator by the proper court in Arkansas? It seems to us that the statement of the position carries with it its own refutation.

The dismissal of the bill of review mentioned in the bill of complainant on April 16, 1888, could give no greater force to the decree of July 25, 1882, than it had in the first instance by reason of its rendition. 2 Daniell, Ch. Pract. §§ 1582, 1585.

Mr. Henry S. Robbins for appellees.

Mr. Justice Gray, after stating the case as above, delivered the opinion of the court.

The claim of each appellee being for less than $5000, the jurisdiction of this court is limited to the questions of law presented by the certificate of division of opinion between the judges of the Circuit Court. *Chicago Union Bank* v. *Kansas City Bank*, 136 U. S. 223.

The defendant was appointed administrator of David Ballentine's estate in Illinois only. As such administrator, he

appeared in and defended the suit brought by these plaintiffs in the Circuit Court of the United States in Arkansas. By the final decree in that suit it was adjudged that he, "as administrator of David Ballentine, deceased," was indebted to the plaintiffs in certain sums, and that he pay those sums to them "out of the assets of the estate of said David Ballentine in his hands remaining to be administered." In that suit he filed a petition for a rehearing, which was overruled.

The manifest intent and purport of that decree was to charge him, as administrator appointed in Illinois, with the payment of the plaintiffs' claims out of the assets in his hands as such administrator. If this case were before us on appeal from that decree, it might be doubtful, to say the least, whether the decree should be affirmed — in view of the general rule that an administrator's power to act, as well as his duty to account, is limited to the State from whose courts he derives his authority, and that therefore he cannot sue or be sued in another State in which he has not been appointed administrator. *Vaughan* v. *Northup*, 15 Pet. 1; *Aspden* v. *Nixon*, 4 How. 467; *Stacy* v. *Thrasher*, 6 How. 44; *Johnson* v. *Powers*, 139 U. S. 156; *Reynolds* v. *Stockton*, 140 U. S. 254, 272; *Judy* v. *Kelly*, 11 Illinois, 211; *McGarvey* v. *Darnall*, 134 Illinois, 367.

But the case does not rest there. The statutes of Arkansas provide that "administrators and executors appointed in any of the States, Territories or districts of the United States, under the laws thereof, may sue in any of the courts of this State, in their representative capacity, to the same and like effect as if such administrators and executors had been qualified under the laws of this State." Arkansas Digest, 1874, § 4473. In accordance with that statute, the defendant, within a year after the overruling of his petition for a rehearing, filed a bill of review, alleging that these plaintiffs were about to proceed against him for the recovery of those sums in the State of Illinois, and praying for a review and reversal of that decree for several reasons, one of which was that he, "being an administrator appointed not by the courts of Arkansas, but by the courts of Illinois, could not be sued in

Arkansas;" and that bill, upon a hearing, was dismissed for want of equity.

The decree dismissing the bill of review for want of equity was a conclusive adjudication upon the merits. The point that the plaintiff in review, being an administrator appointed in Illinois only, could not be sued in Arkansas, was apparent upon the face of the record of the decree sought to be reviewed, was stated in the bill of review, was necessarily involved in the decree dismissing that bill, and was thereby conclusively adjudged against the plaintiff in review, the original defendant. In filing the bill to have the former decree set aside upon the ground that it should not have been rendered against him as an Illinois administrator, he became himself the actor, and submitted that question to a court of competent jurisdiction, and its decision upon that question, whether favorable or adverse to him, was equally conclusive of the matter adjudged. *Lyon* v. *Perin & Gaff Co.*, 125 U. S. 698; *Whiting* v. *Bank of United States*, 13 Pet. 6; *Biddle* v. *Wilkins*, 1 Pet. 686; *Jewsbury* v. *Mummery*, L. R. 8 C. P. 56.

Whatever doubt may have existed as to the validity of the former decree, as binding the assets of the deceased in the hands of the administrator, before the decree upon the bill of review, is removed by the latter decree; and, by the effect of this decree, the former decree must be treated, for the purposes of this case, as a judgment rendered by a Federal court of competent jurisdiction, and binding the assets of his intestate in his hands, just as if it had been rendered in a Federal court held in the State of Illinois.

This being so, the plaintiffs' claim was not barred by the omission to file it within two years in the county court of Lake County, according to the statutes of Illinois, or by the settlement of the estate and the discharge of the administrator in that court. Illinois Rev. Stat. 1874, c. 3, §§ 60, 70, 111. Such would seem to be the result of the decisions in Illinois. *Darling* v. *McDonald*, 101 Illinois, 370; *Diversey* v. *Johnson*, 93 Illinois, 547. But, however that may be, the general equity jurisdiction of the Circuit Court of the United States to administer, as between citizens of different States, the

assets of a deceased person within its jurisdiction cannot be defeated or impaired by laws of a State undertaking to give exclusive jurisdiction to its own courts. *Green* v. *Creighton*, 23 How. 90; *Payne* v. *Hook*, 7 Wall. 425. In *Morgan* v. *Hamlet*, 113 U. S. 449, cited by the appellant, the state statute in question was a mere statute of limitations, clearly applicable to suits in the Circuit Court of the United States, held within the State. *Michigan Insurance Bank* v. *Eldred*, 130 U. S. 693, 696.

The eighth question certified must therefore be answered in the affirmative, and this renders it unnecessary to give a definite answer to any of the other questions.

Decree affirmed.

HAMMOND *v.* HOPKINS.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 62. Argued November 11, 12, 1891. — Decided February 29, 1892.

A court of equity will not aid a party whose application is destitute of conscience, good faith and reasonable diligence, but will discourage stale demands, for the peace of society, by refusing to interfere where there has been gross laches in prosecuting rights, or where long acquiescence in the assertion of adverse rights has occurred; and in these respects each case must be governed by its own circumstances.

A purchase by a trustee of trust property, for his own benefit, is not absolutely void, but voidable; and it may be confirmed by the parties interested, either directly, or by long acquiescence, or by the absence of an election to avoid the conveyance within a reasonable time after the facts come to the knowledge of the *cestui que trust*.

Two partners owned real estate in common, some of which was used in the partnership business. One died making the other by his will a trustee for the testator's children, with power of sale of all the real estate, and directing that the business be carried on. After carrying on the business for some time the trustee sold the real estate, by auction, and bought portions of it in through a third person, and accounted for the half of the net proceeds. This transaction was open, and was known to all the *cestuis que trustent*, and was objected to by none of them. *Held*, That there was nothing in all this to indicate fraud.

Statement of the Case.

In all cases where actual fraud is not made out, but the imputation rests upon conjecture, where the seal of death has closed the lips of those whose character is involved, and lapse of time has impaired the recollection of transactions and obscured their details, the welfare of society demands the rigid enforcement of the rule of diligence.

THE court stated the case as follows:

This was a bill filed in the Supreme Court of the District of Columbia, April 8, 1884, by William B. Hopkins; Anna B. Hopkins, by her next friend William B. Hopkins; Sarah E. Hopkins, by her next friend Elizabeth A. Early; Elizabeth A. Early; Mary V. Wailes; Alice C. Hall; and Ida M. Stone; against Bertha Hopkins; Bertha Hopkins, administratrix of John S. Hopkins; Esther E. Hopkins; Elizabeth B. Luttrell; Ira W. Hopkins; Mary E. Hopkins; Bettie Davenport; Samuel C. Raub, trustee for Bettie Davenport; Samuel C. Raub, executor of George N. Hopkins; L. Freddie Hopkins, administratrix; Thomas J. Luttrell, administrator of George W. Hopkins; and Thomas J. Luttrell, executor of Cornelius Hopkins; alleging that prior to and on the 23d day of November, in the year 1858, John Hopkins and George W. Hopkins were seized and possessed in fee simple, each of an undivided moiety, as tenants in common, of squares numbered ninety-four (94), ninety-five (95), ninety-six (96), one hundred and ten (110), and one hundred and eleven (111), in the city of Washington, as laid down on the public plats of the city; and that John Hopkins, on that day, executed his last will and testament, a copy of which was annexed. That John Hopkins died November 27, 1858, leaving his children and heirs-at-law, Isaac H. Hopkins; Elizabeth A. Early, born Hopkins; George Washington Hopkins; William M. S. Hopkins; Emeline V. Lilburn, born Hopkins; Mary V. Wailes, born Hopkins; Alice C. Hall, born Hopkins; John S. Hopkins, and Levin Hopkins. That Isaac H. and Levin Hopkins have since died intestate and without issue; that George Washington Hopkins died in the month of July, 1870, leaving as his only children and heirs-at-law, William B. Hopkins, then eleven years of age, and Anna B. Hopkins, then two years of age; that the said Emeline V. Lilburn conveyed

on April 7, 1884, all her right and title absolutely and unconditionally in said estate to her daughter Ida M. Stone; and that John S. Hopkins died May 7, 1883, leaving as his only child and heir-at-law the defendant Bertha Hopkins.

That the said George W. and John S. Hopkins accepted the said trust, entered into possession of said premises, carried on the business of brick making for several years, collected the rents and profits of said estate, and, as is charged upon information and belief, sold at various times prior to May 1, 1864, portions of said property for which they received certain moneys, the particulars of which complainants propose to prove before the auditor.

It was then charged that it had lately come to the knowledge of the plaintiffs that "at this period" the trustees meditated a fraudulent scheme to obtain the entire estate in their own right, "freed and discharged of the trusts under which they held it," and that, "in pursuance of this scheme of fraud," John S. Hopkins persuaded his brother William M. S. to convey to him his share in his father's estate, (William being of dissipated habits and mentally enfeebled by alcoholic excesses,) by deed dated June 20, 1860, and recorded July 7, 1860, and under his command and direction to sign the name of his wife, Sarah E. Hopkins, thereto; and by means of fraud obtained the certificate of acknowledgment to said deed of two justices of the peace. Ignorance of these facts was averred, the circumstances of their discovery to be thereafter stated at length.

It was further stated that William M. S. Hopkins on January 28, 1864, conveyed all his right, title and interest in his father's estate to one Christopher Ingle, in trust for the benefit of his wife Sarah E. Hopkins, which fact had lately come to the knowledge of the complainants under circumstances that would thereinafter be set forth at length.

The bill then alleged that in pursuance of the fraudulent scheme before mentioned the trustees advertised the property for sale at public auction on May 10, 1864, a copy of which advertisement was annexed. That they fraudulently procured James Chapman to attend the sale and bid on their behalf as individuals, and that Chapman became the purchaser for them

of squares 95, 96 and 111; of lot 1, square 94; and lots 16, 17, 18, 19, 20, 21, 22, 38 and 39, in square 110; and that on May 20, 1864, George W. and John S. Hopkins conveyed the property to Chapman for the consideration of one dollar, and Chapman reconveyed, under the same date, square 111 to George W. Hopkins, as an individual, for the alleged consideration of $9093.42, and the other property to George W. and John S. Hopkins, as individuals, for the alleged consideration of $10,842. 24, all the conveyances being recorded November 16, 1864. Plaintiffs averred that the purchases by Chapman were for the benefit of the trustees as individuals without the knowledge or consent of the plaintiffs.

It was further charged that "the said trustees, in furtherance of their said fraudulent scheme to possess themselves individually of the said trust estate and brick business, and in order to give a semblance of right to their said fraudulent conduct, did, after a lapse of nearly seven years from the death of their testator, file in the orphans' court of said district 'a first and final account' of what purported to be an 'account of the personal estate of John Hopkins, deceased, by George W. and John S. Hopkins, executors,' alleged to consist of the personal estate of said decedent, of the profits made out of the brick business, and the value of the deceased's interest in the firm of John and George W. Hopkins, showing that there was for distribution the sum of $22,131.46, and these plaintiffs have caused diligent search to be made among the records of said orphans' court for the vouchers and papers on which said account was based, but have not been able to find the same, so as to discover in what manner the item of $14,952.66, the proceeds of sale of the half interest, was made up, a certified copy of which account is herewith filed and prayed to be read as a part of this bill; and the said trustees, without explaining the nature of their trust or their fraudulent conduct in regard to said sales, and without actual notice to or any personal knowledge of any of these plaintiffs, did obtain an order of said court directing a distribution of the sum of $2667.60 to each of the children then living of said John Hopkins as heirs-at-law." The payment of the distributive shares under the order,

(except that allotted to William M. S. Hopkins,) was admitted, but the jurisdiction of the court denied, and ignorance of the alleged fraud set up in excuse of any estoppel arising from the acceptance of and receipts for their shares.

Certain sales to *bona fide* purchasers prior to November 16, 1864, and prior to December 22, 1875, were referred to, and the receipts of moneys therefor. It was then alleged "that the said trustee, George W. Hopkins, trustee as aforesaid, died intestate on the 22d December, 1875, leaving as his only children and heirs-at-law George N. Hopkins; said defendants, Elizabeth B. Luttrell, born Hopkins, Ira W. Hopkins, Mary E. Hopkins, and Cornelius Hopkins; that letters of administration on his estate were granted to said defendants, L. Freddie Hopkins and Thomas J. Luttrell; that said George N. Hopkins has since died, on Nov. 18th, 1881, having first devised, by way of executory devise, all his real estate to said defendant Samuel C. Raub, as trustee for said defendant Bettie Davenport, her heirs and assigns; that the contingency on which said devise was limited has happened, and the equitable estate in fee simple is vested in her, as all of which will more fully appear by reference to said will hereto annexed, and prayed to be read as part of this bill; that letters of administration on said George N. Hopkins' estate were granted to said defendant, Samuel C. Raub; the said Cornelius Hopkins has since died, on July 17th, 1883, having devised his entire estate as follows: One-half to said defendant Mary E. Hopkins, one-quarter to said defendant Elizabeth B. Luttrell, and one-quarter to said defendant Ira W. Hopkins; that to said Thomas J. Luttrell letters testamentary have been granted as executor of said Cornelius Hopkins."

Partition proceedings between John S. Hopkins and the heirs of George W. Hopkins, and between the heirs of George W. Hopkins, were then set up, and the sale by John S. Hopkins of lots allotted to him to *bona fide* purchasers, as also by the heirs of George W. Hopkins. It was further averred that John S. Hopkins died May 7, 1883, leaving him surviving, his widow, Esther E. Hopkins, and Bertha Hopkins, his only child and heir-at-law, and that letters of adminis-

tration on his estate had been granted to Bertha Hopkins as sole administratrix.

The bill then stated:

"That these plaintiffs do severally aver that they have within the last past few weeks discovered for the first. time the following circumstances in the manner herein set out, namely, that when the said John S. Hopkins, trustee, induced his brother and *cestui que trust*, William M. S. Hopkins, to convey to him his estate, as alleged in paragraph eight, the said John S. Hopkins charged the said William that he should not tell his wife, the said plaintiff Sarah E. Hopkins, of his having made such deed, and threatened him that if he did his said wife would leave him and return to Baltimore to her father; that numberless times from that time to the date of his death the said John S. Hopkins inquired of the said William if he had ever informed his wife of the conveyance to him, and on every occasion urged him not to do so; that the said William, being always poor and frequently in positive want for the absolute necessities of life, was constantly importuning the said John S. Hopkins for his share of the estate and waiting for a division when the said John S. Hopkins did pay to the said William at various times in all about nine hundred dollars, and put him off by alleging that he was waiting for the property to rise in value, and when he sold that the said William would get his share. At other times when the said William would threaten to sue the said John S. Hopkins, the latter would bluff him off by such statements that if he did sue he would not get a cent, but that he would give it to his wife who had separated from said William, and that so it was, by intimidations, threats and promises, the said William was always waiting to the hour of the death of the said John S. Hopkins in the hope that he would get his share of the estate; that when the said John S. Hopkins died unexpectedly on May 7th 1883, and had made no provision for the said William, the said William began to seek the advice of counsel as to what were his rights, and after having consulted several without effect, at a considerable waste of time, finally placed his case, about the first of February last past, in the

hands of Samuel L. Phillips, attorney-at-law; that the said attorney undertook the investigation of the case, and discovered for the first time from living disinterested witnesses that the said James Chapman had never paid one dollar of consideration for said land, but had bought the same for and on account of said trustees, and that the sale was fraudulent and void; that the said attorney discovered that the said William had conveyed his interest to said Ingle in trust for said plaintiff Sarah E. Hopkins, his wife, and if any recovery was to be had the said Sarah E. Hopkins should be informed of her rights. The said attorney thereupon wrote a letter to said Sarah E. Hopkins, residing in Baltimore, Md., and who in a day or two after its receipt came to Washington, called on said attorney, and this plaintiff Sarah E. Hopkins avers was told for the first time in her life on the 5th of February, 1884, either of the conveyance by said William to said John S. Hopkins, or the conveyance of William to said Ingle in trust for her benefit, or of the fraudulent practices of said trustees as hereinbefore set forth as to the purchase of said land, and the said Sarah E. Hopkins has thereupon authorized said attorney to bring suit to enforce her rights; that in order to secure further information, if any existed, the said attorney instructed the said William to call on his sisters and make an appointment with them to see him, said attorney, which the said William did do during the month of February or March, 1884, and at which interview the said William informed these plaintiffs Elizabeth A. Early, Mary V. Wailes and Alice C. Hall, of the discovery of witnesses who would testify that the said sales from said trustees to said Chapman and said Chapman to said George W. Hopkins and John S. Hopkins jointly and to said George W. Hopkins individually were without consideration, fraudulent and void, as hereinafter set forth, and these plaintiffs aver that this was the first time in their lives that they or either of them had ever been informed or in any manner known of said fraudulent sales or had any reason to suspect that the same were not true and *bona fide;* that the said attorney called March 27th last past on these plaintiffs Elizabeth A. Early, Mary V. Wailes and Alice C. Hall, and

said Emeline V. Lilburn, and they severally aver that they were informed by said attorney for the first time of the particulars of the fraudulent practices of said trustees in buying at their own sales through said Chapman, as hereinbefore set forth; but on the contrary aver that by the assurance of said trustees that the same were *bona fide*, by the suppression of the truth these many years, by the fact that they were always informed that the said trustees had plenary power under said will of their father, by the great confidence they had in the integrity of their said uncle, by their incapacity as females, entirely unused to business, these plaintiffs Elizabeth A. Early, Mary V. Wailes, Alice C. Hall and their sister, Emeline V. Lilburn, have uncomplainingly submitted to what they have often deplored as their ill fortune, while another member of the family, their own brother, and his daughter, claiming through the same ancestors, was in possession of estates worth over two hundred thousand dollars; that these plaintiffs thereupon immediately resolved to enforce such rights as they were entitled to, and authorized said attorney to take the necessary legal proceedings; that this plaintiff William B. Hopkins was a child only five years of age when said fraudulent sale was made, and said plaintiff Anna B. Hopkins, was not born for nearly five years afterwards, and that this plaintiff William B. Hopkins on the 31st day of March last past, was for the first time in his life informed of the facts hereinbefore recited as to said fraudulent conveyances by said trustees and Chapman; the said Anna B. Hopkins is still an infant fifteen years of age; that Emeline V. Lilburn, the grantor of this plaintiff Ida M. Stone was present on March 27 last past at the interview of said attorney with her said sisters, and heard for the first time in her life that the said sales from said trustees to said Chapman and back to said George W. Hopkins and John S. Hopkins and George W. Hopkins individually were fraudulent and void for the causes herein set forth; and the said plaintiff Ida M. Stone does aver that down to said 27th day of March the said Emeline V. Lilburn knew nothing of said fraudulent practices of said trustees or either of them, but on the contrary discovered the same in the manner hereinbefore set forth;

and the said plaintiff Ida M. Stone does aver that she was ignorant of the same down to April 7, 1884, the date of the conveyance to her, said plaintiff, by her mother, said Emeline V. Lilburn.

"Whereby if these plaintiffs shall prove these facts to the satisfaction of your honorable court, they allege that they have been guilty of no negligence in the prosecution of their rights, and are entitled to relief.

"That these plaintiffs have been informed and so aver that there is yet unsold a large portion of said estate, and in the possession of said defendants, namely, sublots four and six, in square 95; subdivision lots 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 39 and 40, in square 96; subdivision lots 14 and 15, in square 94; and that the same are worth two hundred thousand dollars, and that the distributive share of each of these plaintiffs will amount to twenty thousand dollars."

Complainants thereupon prayed that the deeds "from said trustees to said Chapman, and from said Chapman to said George W. Hopkins and John S. Hopkins jointly, and to said George W. Hopkins individually, may be declared void and cancelled, and that the said estate is held by the defendants, as heirs-at-law of said George W. Hopkins, on the original trusts mentioned in said will of John Hopkins, deceased. That the said estate may be divided, as it was the duty of said trustees to have done. That an account may be stated of the sums received, with interest, on all sales made by said trustees or either of them, or by any of the defendants, and also of what these plaintiffs or either of them received, with interest, on said pretended division, and that these plaintiffs may be allowed, according to their respective interests, their shares of such sales, and that such sums found to be due to each of these plaintiffs may be declared to be a lien on the said real estate respectively held by them, the defendants." And for judgment and execution; injunction; a receiver; and general relief. Answers under oath were expressly waived.

Among the exhibits attached was a copy of the will of John Hopkins, as follows, omitting some formal and immaterial portions:

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"I give and bequeath my little slave boy Frank to my daughter Victoria Hopkins, as her sole and absolute property.

"I give and bequeath my servant woman Leah aged about twenty-seven years, and her youngest child Robert and any increase of said slave woman, to my daughter Alice as her sole and absolute property.

"I give and bequeath my slave woman Hannah and any increase she may have to my daughter Elizabeth A. Early as her absolute property, on the condition however that the sum of four hundred dollars shall be deducted from my said daughter's share in the final distribution as hereafter provided.

"I give and bequeath all the rest, and residue of my property of every description, real, personal and mixed, situate and being in the District of Columbia or elsewhere, to my brother George W. Hopkins, and my son John S. Hopkins, and the survivor of them and the heirs, executors, administrators and assigns of such survivor. In trust nevertheless and to and for the uses and upon the trusts following and none other, that is to say:

"To carry on the brick-making business as now conducted by my said brother George W. Hopkins and myself in Washington city, D.C. Said business to be under the direction of my said brother George W. Hopkins assisted by my said son John S. Hopkins as clerk, for which he is to receive a regular stated salary.

"To receive the rents, profits, issues and income of said estate, and of said business, or my portion thereof, and to apply the same first and immediately without waiting for the year allowed by law to expire, to the payment of my funeral expenses, and all my just debts, which are few, next to a reasonable and proper pay or salary to my said son John S. Hopkins, as clerk in said business at the kiln, said pay to be sufficient for the reasonable and proper maintenance of my said son and his family, and then to the proper and reasonable expenses and support of my family (including my said daughter Elizabeth A. Early and her daughter) as it now exists, and the education of the younger members thereof: And the surplus of such rents, issues, profits and income, if any, shall be

from time to time (after the payments from time to time as above) invested by my said trustees as hereafter stated, or, may [be] from time to time in such sum or sums advanced by my executors and trustees as they may in their discretion deem fit to such of my children as my said trustees and executors may think really need and deserve it, such sums so advanced to be, without interest, deducted from the share or shares of the child or children receiving the said advances, in the final distribution of my estate as hereafter provided: And upon further trust that my said trustees shall (where in their judgment a sale of the real property owned by me and my said brother George W. Hopkins, or any part thereof, or of the brick-kilns and the materials or implements thereunto belonging, or of said business, is essential or necessary for any cause whatever or would be advantageous) sell and dispose of at public or private sale, at such time or times after such notice and upon such terms as they may deem most for the interest of my estate, and by proper conveyances convey the same to the purchasers, who, having paid his or her purchase-money to my said executors, shall be under no obligation to see to the application thereof under the trust of this, my will, nor answerable for the misapplication of the same: And upon further trust that the proceeds of any such sales, as well as the surplus proceeds or incomes as hereinbefore stated, if any there be, shall be by my said trustees reinvested in such safe and profitable securities as to my said trustees shall seem best, whether the same be in real estate, mortgages, deeds of trust or stocks, subject, however, to the privilege of advances as already given and stated, of which the said trustees are alone to judge: And upon further trust that upon the arrival of my daughter Alice to the age of eighteen years, which will occur on or about the first day of May, eighteen hundred and sixty-four, my estate of every kind shall be divided by my said trustees and executors among my children, deducting from the share of each child in such division the amount of such advances so as aforesaid made to him or her, and deducting from the share of my said daughter Elizabeth A. Early, the sum of four hundred dollars for the slaves aforesaid bequeathed

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to her, provided, however, that no deduction is to be made in such final division from the shares of those children now at home and remaining there as of my family (nor from the share of my said daughter Elizabeth A. Early for the board and maintenance of her said daughter Mary), for any amount advanced for the support of the family for the education of Alice; and in further trust that my daughter Alice's portion in such division shall be held and taken by my said trustees in trust for her until her arrival at the age of twenty-one years, or her marriage, and the interest of her share until the happening of either event shall be paid towards her support and comfort: and upon her arrival at the age of twenty-one years, or her marriage, her portion shall be paid or delivered at once to her in such manner as my said trustees shall think most for her interest, and in case of her death before marriage or becoming of the age of twenty-one years, her said share be divided equally among the rest of my children.

"And upon further trust that the respective shares of my sons Isaac and Levin shall also be taken and held by my said trustees in trust for said sons Isaac and Levin or be paid over to them by instalments, or in whole, or retained and the interest paid them as in the judgment of my said trustees may seem best and most for the interest of my said sons Isaac and Levin.

"I wish and direct that in the division of my estate as aforesaid, such of my slaves as have not been hereinbefore bequeathed, shall be appraised, by agreement among my children, by my said trustee, or by disinterested persons elected by said trustee, and that my children shall each select for herself or himself the slave or slaves they may each desire, or, if that cannot be done, that the distribution of such slaves among my children be by lot, and that the amount of the appraisement of such slaves so selected or drawn shall be so much of the share of the child so selecting or drawing. I wish and direct that my slaves shall not be sold out of the family before such final division of my estate nor after such division by the children to whom they may be respectively allotted in such division, unless for grossly improper conduct or insubordination. I

greatly desire, as already stated, that my family shall remain as it now is, without change or modification or sale or valuation of the furniture or slaves until the said division of my estate, and that it shall until then be supported by the brick-kiln business as though I were living, and as I believe the squares and lots of ground owned by my brother George and myself is now and will continue to increase in value, I desire, if possible, that said land may be kept unsold and undivided until as above stated, as it will thus be greatly to the advantage of my family; but as circumstances, now unforeseen, may make a change necessary or desirable, I cheerfully trust in the prudence and discretion of my said trustees, and I give them full power as above to exercise their judgment as circumstances may arise, making it proper to dispose of said land and business, or to change and alter the same, believing that they will have the comfort and welfare of my family and their relatives much at heart.

"Lastly, I hereby nominate and appoint my said brother, George W. Hopkins, and my said son, John S. Hopkins, executors of this my last will and testament, hereby revoking and annulling all other wills heretofore made."

Also the advertisement of the sale of May 10, 1864:

"By Jas. C. McGuire & Co., Auctioneers.

"Executors' Sale of Valuable Brick Yard and Appurtenances.

"The whole square No. 111, with fine brick residence and out-buildings, large number of lots, some of them improved with frame dwelling-houses, together with the machinery, material, and implements for the manufacture of brick. On Tuesday afternoon, May 10th, at 3 o'clock, on the premises, we shall sell the whole of squares Nos. 95 and 96, in the northern part of the First Ward, on Twentieth street west, known as 'Hopkins' brick yard,' which is believed to be one of the best located in the District, having both Georgetown and Washington for a market, an abundance of fine clay, brick and tempering sheds, kilns, offices, and all necessary outfit for a first-class brick yard. The yard will be worked until the day of sale.

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"Immediately after we will sell the stock of horses, mules, carts, wheelbarrows, buggy, moulds, sieves, sand, &c., &c.; also the whole of square No. 111, formerly the residence of Colonel Eaton, fronting respectively on Connecticut avenue, 20th street north, Q and R streets, and 19th street west, improved by a large brick dwelling-house and back buildings, carriage-houses, stabling, &c., &c., the whole enclosed and beautified with fruit and ornamental trees and shubbery.

"Also—

"Lots Nos. 8, 9, 10, 15, 16, 17, 18, 19, 20, 21, and 24, in subdivision of square No. 110, fronting each on 20th street, between R and T streets.

"Lots 36, 37, 38, 39, 42, 43, 44, and 45, in same square, fronting on 19th street west between R and T streets. Four of the latter are improved each with a small frame dwelling-house, and will be sold separately.

"Also—

"The whole of square No. 94, fronting respectively on Massachusetts avenue, 20th and 21st streets west and north, Q street, with the improvements, consisting of one large frame stable and sheds, two small frame houses, and an office.

"Terms of sale: One-third cash, the remainder in 6, 12, and 18 months, with interest, secured by a deed of trust on the premises. All conveyancing, including revenue stamps, at the cost of the purchaser.

"A cash payment on each piece of real estate will be required at the time of sale.

"GEO. W. HOPKINS,
"JOHN S. HOPKINS, *Executors.*
"(Chron. & Star.) JAS. McGUIRE & Co., *Auct's.*"

A copy of the "first and final account of George W. and John S. Hopkins, executors of John Hopkins, deceased, the requisite legal notice having been given," was also annexed, and other exhibits.

Defendant Davenport answered, setting up, among other things, the death of the child referred to in the will of George N. Hopkins, and the conveyance of the real estate therein

named to her by defendant Samuel C. Raub, as to whom the bill was taken as confessed.

The answers of defendants Bertha Hammond, Esther E. Hopkins, Elizabeth B. Luttrell, Ira W. Hopkins, Mary E. Hopkins, and Thomas J. Luttrell were duly filed, denying specifically the different allegations of fraud. They admitted that Chapman purchased for the benefit of the trustees, and one of them, but with the knowledge and acquiescence of all parties interested; and the circumstances in reference to the sale were thus set forth in the answer of Bertha Hammond:

"Further answering, on information and belief, the matters alleged in the three foregoing paragraphs, I say that the said George W. Hopkins and the testator, John Hopkins, were partners in trade for years before the death of the latter, and that their business consisted in the manufacture of bricks, and that the property mentioned was purchased in the years 1849, 1854, and 1855 for the purposes of their said business and used for such purposes, so far as required, until the death of the said John Hopkins, and afterwards, in pursuance of the provisions of his last will and testament, until the youngest child, Alice, had attained the age of eighteen years, which event occurred in April, 1864; that until such time the business of brick-making had continued as before the death of the testator in pursuance of the provisions of his will, but under the authority thereby conferred it had been necessary to dispose of some few pieces of ground, the purchase-money whereof was duly accounted for; that upon the happening of such event, the period fixed by the will for the division of the estate, the children of the said testator were eager to obtain their respective shares of the estate; that it was well known to all the said children that the said George W. Hopkins and John S. Hopkins proposed to continue the said business, and to that end to purchase the necessary parcels of ground at the prices at which the same should sell at public auction; that the said children were not only willing but desirous that the business should be continued and the necessary purchase made, their only interest being in obtaining the best prices; that, in

order to obtain such prices, the whole title to the property was sold, as well the interest of the said George W. Hopkins as of the testator; that the said sale was of the property in separate parcels and was in all respects fairly conducted, and that the prices obtained were the full value of the property; that the said George W. Hopkins and John S. Hopkins bought with full knowledge and consent of the said children and duly accounted for the purchase-money; that at the time of the sale of the property, except where the residence of George W. Hopkins stood in square 111, was a common, the streets of the city not having been opened, and the kilns for burning bricks standing on square 94; that there were no circumstances of suppression or concealment, but the deed to James Chapman, placed upon record, on its face showed only a nominal consideration, and that all parties interested well knew that said Chapman bought for the benefit of the said George W. Hopkins and John S. Hopkins, and that the latter, after the said purchase, continued the said business with the knowledge and acquiescence of the said children of the testator until the death of the said George W. Hopkins, in 1875."

The answers averred that the account of the trustees and executors was properly settled in the orphans' court, and pleaded in bar the order of that court carried into execution by the parties interested. The matters in excuse of laches were denied, and the great length of time, the death of parties and witnesses, the increase in value of the property, and other circumstances, were set up as an equitable bar.

July 8, 1884, an amendment was filed as to paragraphs ten and thirteen of the bill. These amendments alleged prearrangement to prevent competition, and that squares 95 and 96 were offered and sold as an entirety and thereby brought a price far below what they would have brought, if advertised to be sold and sold in lots; that the time was unpropitious for a sale, etc., etc.; and that the trustees had appropriated to themselves part of the personal property belonging to the brick-kiln business. And notice, either actual or constructive, of the proceedings in the orphans' court was denied.

These amendments were answered by the principal defend-

ants and the allegations denied, the defences reiterated and the want of explanation of laches set up.

June 4, 1885, paragraph thirteen of the original bill was again amended by charging that the order of settlement and distribution of the orphans' court was fraudulently obtained, in that neither of the trustees made known to the court the nature of their trust, if the accounts included the proceeds as well as the sales of the real estate, nor informed the court of their fraudulent conduct in regard to the sales, nor that any notice, either actual or constructive, had been given the complainants of the settlement and distribution of the estate; and prayed that the order of distribution might be disregarded and set aside and distribution made of the estate as by law it should be, and the defendants be prohibited from availing themselves of the fraudulent settlement and distribution. Paragraph sixteen was also amended by adding that the trustees failed to account for the sale of lots 12, 13, 14, 15, 25, 26, 29, and 40, of square 110, and had sold and fraudulently paid over to George W. Hopkins one-half of the proceeds of lots 3, 4, and 5, in square 67.

The principal defendants answered these amendments and traversed their allegations. They admitted the sale of the lots in square 110, which were made before May 10, 1864, and averred that the proceeds had been accounted for. They further averred that lots 3, 4, and 5, in square 67, belonged to George W. and John S. Hopkins in common; that the said George W. and John S. Hopkins were partners in the brick-making business prior to 1858, and that these lots were acquired for the purposes of said business, and were so used by them, and that the proceeds of sale were duly accounted for. Replications to all the answers were filed. The cause came on to be heard in special term before Mr. Justice Merrick, and the bill as amended was decreed to be dismissed, with costs. The opinion appears in the record.

On appeal, the court in general term reversed the decree of the special term, and adjudged that the sales to Chapman of May 10, 1864, were fraudulent and void, and that the deeds from the trustees to Chapman and from Chapman to George

W. and John S. Hopkins, as individuals, and the deed from Chapman to George W. Hopkins, individually, were null and void, and that the same be set aside. It was further adjudged that the title of the defendants to the real estate remaining unsold should be divested; and that the defendants should account to the complainants before the auditor for the purchase moneys arising from all sales made by the trustees of portions of the real estate bought through Chapman, with interest; and also for the purchase moneys arising from all sales made by the defendants; and also for all rents and profits received by the defendants. In the account the one-half of the proceeds of the sale of lots 3, 4, and 5, square 67, received by George W. Hopkins, with interest from June 18, 1872, was directed to be included. And the decree provided for a partition or sale of the unsold real estate, with directions to the auditor as to the mode of dividing the proceeds if a sale should take place.

From this decree the defendants and each of them prayed an appeal to this court, which was allowed.

It appeared from the evidence that George W. Hopkins and John Hopkins were brothers and copartners in the business of manufacturing bricks, and for the purposes thereof acquired and used certain squares of ground in the city of Washington, on which there were clay deposits. As early as 1846 they carried on the business on square 67, and in July, 1849, purchased squares Nos. 94, 95, and 96 at a cost of between one and two cents per square foot. Their office and stable were on square No. 94 and their kilns and drying sheds on squares Nos. 95 and 96. August 9, 1854, they purchased square 111, on which was a brick dwelling-house, at the price of five cents per square foot; and on December 27, 1855, square 110 at two cents per square foot. By the deeds for these squares the property was conveyed to the grantees in fee simple as tenants in common. Immediately after the purchase of square 111, George W. Hopkins moved into the dwelling-house thereon and resided there until his death in 1875. On the 27th of November, 1858, John Hopkins died, leaving the last will and testament attached to the bill, which was duly admitted to

probate by the orphans' court December 4, 1858; and George W. and John S. Hopkins qualified thereunder as executors, December 14, and the business was conducted as before.

The family of John Hopkins consisted of nine children, one of whom, Levin, died in 1863, unmarried and intestate, and his share devolved upon the other children; so that when Alice attained the age of eighteen, on April 13, 1864, the estate of John Hopkins was represented by the eight surviving children, his devisees and next of kin. His estate consisted mainly of his undivided moiety of squares 94, 95, 96, 110, and 111.

On September 16, 1859, George W. Hopkins in his own right, and he and John S. Hopkins as executors, made a subdivision of the original lots in square 110, and subsequently sold at different times a number of the subdivision lots. On April 13, 1864, there were unsold in this square the following lots: 8, 9, 10, 15, 16, 17, 18, 19, 20, 21, 24, 36, 37, 38, 39, 42, 43, 44, and 45. John Hopkins resided in Georgetown at the time of his death, and his children or some them continued to reside there until 1862, when they removed to the dwelling-house on square 111 occupied by their uncle George W. Hopkins. When Alice attained the age of eighteen, the seven other children were of about the following ages: Isaac H., 40; Elizabeth A. Early, 39; John S., 37; Emeline V. Lilburn, 36; George Washington, 35; William M. S., 33; Mary V. 25. Mrs. Lilburn lived in St. Mary's County, Maryland, and Elizabeth A. Early, Mary Victoria, Alice C., John S. and Isaac H. Hopkins lived with their uncle, George W. William M. S. and George Washington lived elsewhere in Washington. Mary subsequently married one Wailes, and Alice one James R. Hall.

Under the will, upon the arrival of Alice at the age of eighteen years the estate was to be divided, and in order to do this it seems to have been deemed advisable to sell the undivided moiety of the real estate. The other undivided moiety belonged to George W. Hopkins, and the trustees and executors, instead of selling one moiety, advertised and sold the whole interest in the property, as well that owned by

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George W. as that owned by the estate. The advertisement bears date the 20th of April, 1864, and advertises the sale at public auction for the 10th of May following. This advertisement has already been set forth, and under it squares 95 and 96, known as "Hopkins' brick yard," were with the outfit advertised to be sold as a whole, as was also square 111 with the dwelling-house and other improvements. At the sale the trustees purchased the squares 95 and 96 at 4 cents per square foot; lot No. 1 in square 94 at 10 cents per square foot; and lots 16, 17, 19, 20, 22, and 39 in square 110 at 8½ cents per square foot. George W. bought square 111 at 9 cents per square foot. These purchases were made through one James Chapman, who acted on behalf of the purchasers. Lot 6 in square 94 was sold to August Miller at 13 cents per square foot; lots 2, 3, and 4, at 10½ cents; and lot 5 at 14 cents. Lots 8 and 9 in square 110 were sold to James L. Roche at 11 cents per square foot; lots 10 and 24 to Joseph Gawler at 10 cents; lots 36 and 37, with improvements, at $290 apiece; lots 41, 42, 43, and 44 to W. C. Longstreth at 6½ cents per square foot. On May 20, 1864, the property in question was conveyed by the trustees to James Chapman, and he on the same day conveyed to George W. and John S. Hopkins the squares and lots purchased by them jointly, and to George W. the square purchased by him alone. The deeds were recorded November 16, 1864. The consideration in the conveyance to Chapman was merely nominal, one dollar, while the considerations in the deeds from him recite as paid by the grantees the price for which the property was purchased at the sale. On August 23, 1864, the orphans' court passed an order appointing September 13, 1864, as the time for the final settlement and distribution of the personal estate of the testator, and notifying his devisees and heirs to attend the court on that day. The copy of the order was published in accordance with the direction of the court in the National Intelligencer nine times, commencing August 24 and ending September 12, 1864.

It appears by the minutes of the court that on March 28, 1865, the register of wills reported to the court the first and final account of the executors, and the same was approved and

passed by the court, and it was ordered that "the executors aforesaid make distribution of the assets in hand to the heirs in accordance with the provisions of the will of the deceased." This account treated the moiety of the proceeds of the sale of the real estate, including the sale of May, 1864, as partnership property to be accounted for in the orphans' court as personalty. In the account the executors charged themselves with the amount of the inventory, a policy of insurance, certain sums paid for slaves emancipated in the District, and some items of interest, etc. The debit account amounted to $24,155.59, and contained this item: "And with this amount, being one-half the earnings of firm of J. & G. W. Hopkins in conducting the brick kiln, owned in part by deceased, from the day of his death to date of rendering this account, first deducting the expenses of the family of deceased and other expenses, directed by the will of said deceased to be defrayed out of said earnings, and also the value of deceased's interest in said firm, as per affidavit filed with vouchers, $14,952.66." The credits amounted to $2024.13. No commissions were charged, and the balance shown was $22,131.46. This was followed by a distribution account, which, after deducting $8 fees from the balance $22,131.46, and $782.60 paid out on specific legacies, there was left $21,340.86, which was distributed among the eight surviving children of the decedent, namely: Isaac H. Hopkins, John S. Hopkins, Elizabeth A. Early, George W. Hopkins, William M. S. Hopkins, Emeline V. Lilburn, Mary V. Hopkins, and George W. and John S. Hopkins in trust for Alice C. Hopkins, being the sum of 2667.60\frac{4}{4}$ each. This account was filed and recorded March 28, 1865, and passed by order of court.

The affidavit and vouchers mentioned do not appear in the record, and it is said that after diligent search they cannot be found. Within a few days after the passage of the order distribution was made, and the receipts of the different parties entitled were delivered by the executors to the register and by him recorded. The share of William M. S. was receipted for by John S.; the share of Alice, receipted for by the executors, was by them held in trust until she attained the age of twenty-

one, and was afterwards paid to her and her husband. After the sale of May 10, 1864, George W. and John S. Hopkins carried on the brick-making business on squares Nos. 95 and 96, and lot 1, square 94, until as late as 1873, and probably as 1875, when George W. died. After his death John S. filed a bill for the partition of the property owned in common, the other lots purchased in common having been sold, and by the decree of the court below of February 27, 1877, lots 1, 2, 3, 4 and 6, in square 95, and lots 5, 6, 7, 8, 9 and 10 and 11 in square 96 were allotted to him in severalty. Lot 1 in square 94, and lot 5 in square 95, and lots 1, 2, 3, 4, 12, 13, 14, 15 and 16 in square 96, were allotted to the heirs of George W. Hopkins. Thereafterwards the children and heirs-at-law of George W. filed a bill for the payment of his debts and for a partition of the property allotted to them in the first suit, and also of square 111, where he resided until his death, and a decree was rendered in which a part of the property was sold for the payment of debts, and the remainder allotted to the heirs-at-law in severalty. Nearly all of the lots thus allotted had been sold when the bill in this case was filed. John S. Hopkins, the other trustee, died intestate May 7, 1883. He left a widow, Esther E. Hopkins, and an only child and heir-at-law, Bertha Hopkins, who was at that time 25 years of age. After the partition between John S. and the heirs-at-law of George W., John S. built a row of houses on the lots in square 96 at a considerable cost. None of the property allotted to him in the partition suit was sold by him prior to his death, except the east part of square 95.

As already stated, George W. and John Hopkins in 1846 carried on their business on square 67, and in 1869, after the death of John Hopkins, a deed was made by Charles E. Mix to George W. Hopkins and John S., as executors and trustees, for lots 3, 4 and 5 in said square. These lots were sold and conveyed by the executors and trustees, June 18, 1872, for $6784, and of these proceeds George W. received one-half as copartner, or $3392, and the other half was paid over to the beneficiaries entitled, who duly receipted for their respective shares in full of all demands to date. The share of George

Washington Hopkins was receipted for by Mary A. Hopkins, his administratrix.

June 20, 1860, William M. S. conveyed in fee simple all his interest in his father's estate to his brother John S. for the consideration, as expressed in the deed, of $3000. This deed was also signed by Sarah E. Hopkins, the wife of the grantor, and was acknowledged on the day of its date by the grantor and his wife before two justices of the peace, and recorded July 7, 1860. By deed dated January 28, and acknowledged and recorded January 29, 1864, William M. S. conveyed the same share, with all his property, to Christopher Ingle, in trust for his wife for life, and then over to his children and himself.

Mr. Walter D. Davidge, and *Mr. George F. Edmunds* for appellants. *Mr. Sidney T. Thomas* and *Mr. Henry Wise Garnett* were with them on the brief.

Mr. Samuel L. Phillips and *Mr. Samuel Shellabarger* (with whom were *Mr. John J. Johnson* and *Mr. J. M. Wilson* on the brief) for appellees. The case was argued mainly on the facts. The following points of law were made in appellees' brief.

Long acquiescence and laches by parties out of possession are productive of much hardship and injustice to others, and cannot be excused except by showing some actual hindrance or impediment caused by the fraud or concealment of the party in possession, which will appeal to the conscience of the chancellor. *Lansdale* v. *Smith*, 106 U. S. 391.

Without reference to any statute of limitations the courts have adopted the principle that the delay which will defeat a recovery must depend upon the particular circumstances of each case. *Harwood* v. *Railroad Company*, 17 Wall. 78.

The party who makes such appeal should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim, how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance, and how and when he first came to a knowledge of the matters alleged in his bill. *Badger* v. *Badger*, 2 Wall. 87.

Argument for Appellees.

It is a principle of law, as well as of natural justice, that greater consideration and care are due to persons known to be unable to take care of themselves, than to those who are fully able to do so. *Graffam* v. *Burgess*, 117 U. S. 180.

The office of trustee is important to the community at large, and frequently most so to those least able to take care of themselves. It is one of confidence. The law regards the incumbent with jealous scrutiny, and frowns sternly at the slightest attempt to pervert his powers and duties for his own benefit. *Railroad Company* v. *Durant*, 95 U. S. 576.

These trustees knew the value of subdivision in securing good prices at the sale, and nevertheless sold square 111 as a whole. Such conduct between trustee and *cestui que trust* reaches far beyond what was necessary to be proved in this case in order to set the sales aside. When this relation subsists, the slightest obliquity, the slightest indirection is adequate, on grounds of public policy. *Villa* v. *Rodriguez*, 12 Wall. 323; *Shaw* v. *Railroad Co.*, 100 U. S. 605. Reasonable certainty is all that is necessary in case of fraud. *Kempner* v. *Churchill*, 8 Wall. 362; *Neale* v. *Neales*, 9 Wall. 1; *Rea* v. *Missouri*, 17 Wall. 532; *Graffam* v. *Burgess*, 117 U. S. 180.

It was the duty of the trustees in making the sale to exercise that diligence and caution which a careful and prudent owner would observe in the sale of his own property. If the sale be made under circumstances of haste and imprudence, or if the trustees fail in reasonable diligence in inviting competition, or adopt an injudicious and disadvantageous mode of selling the property, a court of equity ought not to ratify the sale. *Gould* v. *Chappell*, 42 Maryland, 466; *Ord* v. *Noel*, 5 Madd. 438; *Harper* v. *Hayes*, 2 Gif. 210; *Turner* v. *Harvey*, 1 Jacob, 169; *Bridger* v. *Rice*, 1 Jac. & Walk. 73; *Mortlock* v. *Buller*, 10 Ves. 292; *White* v. *Cuddon*, 8 Cl. & Fin. 766.

Although the rule of law, as now firmly settled, is that a trustee may buy of his *cestui que trust*, provided there is a distinct and clear contract to that effect, made under such circumstances as indicate that the *cestui que trust* was aware of the correct value of the property, that the trustee had no

special knowledge of the value of the thing bought, which was not also possessed by the beneficiary, and that no undue influence arising out of the trusteeship was brought to bear on the mind of the *cestui que trust* — in a word, that they stood at such length to each other as amicable buyer and seller sustain ordinarily one to the other; yet it has been as distinctly decided that the relaxation does not extend to a purchase by a trustee at his own sale. Such a sale is *ipso facto* voidable by the *cestui que trust*, on ground of public policy. Lewin on Trusts, 438; *Michoud* v. *Girod*, 4 How. 503.

Fullness of price, absence of fraud, and fairness of sale are not sufficient to countervail this rule of policy. *Armstrong* v. *Huston*, 8 Ohio, 552; *Ricketts* v. *Whittington*, 15 Maryland, 46; *Jamison* v. *Glascock*, 29 Missouri, 191; *Woodruff* v. *Cook*, 2 Edw. Ch. 259; *Spindler* v. *Atkinson*, 3 Maryland, 409; *S. C.* 56 Am. Dec. 755.

The theory of the defence is that these *cestuis que trustent* are guilty of laches in not investigating and discovering these frauds. They assert in their answers and attempt to prove in their evidence there was no fraud, and although asserting this innocency, they claim negligence for not finding out what they say did not exist. But the law is that the office of trustee is an important one — an office of trust and confidence; one in which the weak and incompetent may find shelter and protection. It is the duty of the trustee to execute the trust, and it is not the duty of the *cestui que trust* to make any inquiries. *Taylor* v. *Taylor*, 8 How. 183, 200; *Dresser* v. *Missouri & Iowa Railway Construction Co.*, 93 U. S. 92; *Graffam* v. *Burgess*, *ubi sup.*; *Dorsey* v. *Packwood*, 12 How. 126, 131; *Villa* v. *Rodriguez*, *ubi sup.*; *Allore* v. *Jewell*, 94 U. S. 506, 512; *Zeller* v. *Eckert*, 4 How. 288, 295.

It is sought to prove a consent by the *cestuis que trustent* to the purchaser by the trustees. But the alleged consent was not such a consent as the law contemplates. The *cestuis que trustent* were merely passive, and such an action is not consent, as expressly decided by the Supreme Court of Pennsylvania in the case of *Paul* v. *Squibb*, 12 Penn. St. 296. Confirma-

tion must be a solemn and deliberate act, Lewin on Trusts, 450; no *suggestio falsi*, no *suppressio veri:* and not fished out from loose expressions. *Carpenter* v. *Heriot*, 1 Eden, 338.

No laches can be claimed by reason of the relationship between the parties: no acquiescence or ratification of illegal or unlawful acts, spelt out by the most equivocal and uncertain testimony of more equivocal and uncertain acts testified to. *Kennedy* v. *Kennedy*, 2 Alabama, 571; *Boney* v. *Hollingsworth*, 23 Alabama, 690; *Sears* v. *Shafer*, 2 Selden, (6 N. Y.) 268; *Michoud* v. *Girod*, *ubi sup.*; *Brooks* v. *Martin*, 2 Wall. 70.

The settlement in the orphans' court was no estoppel. That court had no jurisdiction over the distribution of equitable assets or real estate. *Robertson* v. *Pickrell*, 109 U. S. 608. The interest of John Hopkins in these squares was real estate.

Nor was the receipt of the distributive share allowed in the settlement an estoppel. *Embry* v. *Palmer*, 107 U. S. 3; *Michoud* v. *Girod*, *ubi sup.*

The plaintiff, Sarah E. Hopkins, being a married woman, no laches can be charged against her. *House* v. *Mullen*, 22 Wall. 42.

These sales being fraudulent, a court of equity will not allow the trustees or their heirs to reap any advantage from their scheme, but will set the sales aside *ab initio*, and hold them to an account for the profits which they have made — doing equity, however, to them, which they refused to others, in allowing them credit for their lawful expenditures, as improvements, taxes and payments to the appellees with interest thereon. *Oliver* v. *Piatt*, 3 How. 333, 401.

Mr. Chief Justice Fuller delivered the opinion of the court.

This bill was filed April 8, 1884, and attacked the purchases through Chapman at the sale of May 10, 1864, and the account stated and settled in the orphans' court March 28, 1865; the settlement made in 1873 of the proceeds of the sales of lots 3, 4 and 5 in square 67; and also the deed from William M. S. Hopkins and wife to John S. Hopkins of June 20, 1860. The

executors and trustees of John Hopkins; James Chapman, who purchased at the sale; Isaac and George Washington Hopkins, two of the sons and devisees of John Hopkins, and who were present at the sale, were all dead; the affidavits and vouchers filed in the orphans' court at the executors' settlement could not be found; partition had been had by judicial proceedings between one of the trustees and the heirs at law of the other, and also between the latter; and great changes had taken place in the quarter of the city where the lots and squares were located, coupled with an enormous increase in their value, in the lapse of twenty years, and because of the improvements which had in the meantime been made in their vicinity.

No rule of law is better settled than that a court of equity will not aid a party whose application is destitute of conscience, good faith and reasonable diligence, but will discourage stale demands, for the peace of society, by refusing to interfere where there have been gross laches in prosecuting rights, or where long acquiescence in the assertion of adverse rights has occurred. The rule is peculiarly applicable where the difficulty of doing entire justice arises through the death of the principal participants in the transactions complained of, or of the witness or witnesses, or by reason of the original transactions having become so obscured by time as to render the ascertainment of the exact facts impossible. Each case must necessarily be governed by its own circumstances, since, though the lapse of a few years may be sufficient to defeat the action in one case, a longer period may be held requisite in another, dependent upon the situation of the parties, the extent of their knowledge or means of information, great changes in values, the want of probable grounds for the imputation of intentional fraud, the destruction of specific testimony, the absence of any reasonable impediment or hindrance to the assertion of the alleged rights, and the like. *Marsh* v. *Whitmore*, 21 Wall. 178; *Landsdale* v. *Smith*, 106 U. S. 391; *Norris* v. *Haggin*, 136 U. S. 386; *Mackall* v. *Casilear*, 137 U. S. 556; *Hanner* v. *Moulton*, 138 U. S. 486.

The main contention here is that the sale of May 10, 1864, should be set aside as to the purchases by the trustees through

Chapman, on the ground of constructive, coupled with actual, fraud.

Undoubtedly the doctrine is established that a trustee cannot purchase or deal in the trust property for his own benefit or on his own behalf, directly or indirectly. But such a purchase is not absolutely void. It is only voidable, and as it may be confirmed by the parties interested, directly, so it may be by long acquiescence or the absence of an election to avoid the conveyance within a reasonable time after the facts come to the knowledge of the *cestui que trust.*

The often cited case of *Michoud* v. *Girod*, 4 How. 503, laid down the general rule that a person cannot purchase legally on his own account that which his duty or trust requires him to sell for another, nor purchase on account of another that which he sells on his own account, and that a purchase, *per interpositam personam*, by a trustee or agent of the particular property of which he has the sale, or in which he represents another, whether he has an interest in it or not, carries fraud on the face of it; but there was actual fraud in that case, and the rule that within what time a constructive trust will be barred must depend upon the circumstances was recognized. In *Stearns* v. *Page*, 7 How. 819, 829, Mr. Justice Grier, speaking for the court, said that a complainant, seeking the aid of a court of chancery under such circumstances of lapse of time as there existed, "must state in his bill distinctly the particular act of fraud, misrepresentation, or concealment — must specify how, when, and in what manner it was perpetrated. The charges must be definite and reasonably certain, capable of proof, and clearly proved. If a mistake is alleged, it must be stated with precision, and made apparent, so that the court may rectify it with a feeling of certainty that they are not committing another, and perhaps greater, mistake. And especially must there be distinct averments as to the time when the fraud, mistake, concealment or misrepresentation was discovered, and what the discovery is, so that the court may clearly see, whether, by the exercise of ordinary diligence, the discovery might not have been before made. Every case must, of course, depend on its own peculiar circumstances, and there

would be little profit in referring to the very numerous cases to be found in the books on this subject. In the case of *Michoud* v. *Girod*, 4 How. 503, lately decided in this court, transactions were investigated after a lapse of more than twenty years; but the facts proving the fraud were all on record, and were not disputed. The false accounts made out against the estate of the deceased by the executors were on file, and their iniquity was apparent on their face. Moreover, the complainants resided in Europe and were kept in ignorance of their rights, and hindered from prosecuting them by the promises, threats and fraud of the guilty parties."

And in *Badger* v. *Badger*, 2 Wall. 87, 95, the same eminent judge observed that a party seeking to avoid laches "'should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in his bill; otherwise the chancellor may justly refuse to consider his case, on his own showing, without inquiring whether there is a demurrer or formal plea of the statute of limitations contained in the answer.'"

It is conceded that the proposition that where a trustee or person, acting for others, sells the trust estate and becomes himself interested in the purchase, the *cestuis que trust* are entitled as of course to have the purchase set aside, is subject to the qualification that the application for such relief must be made within a reasonable time, and that laches and long acquiescence cannot be excused except by showing some actual hindrance or impediment caused by the fraud or concealment of the party in possession, which will appeal to the conscience of the chancellor. But it is argued that such fraud and concealment existed here, and in that connection assertions and insinuations of fraud in fact are made.

Appellees' counsel contend that, although George W. Hopkins and John S. Hopkins were men of character and integrity, yet they were good business men, and that John S. was self-reliant, reticent and close in money matters, while the four

daughters were unaccustomed to business, and of the other three sons, two were dissipated and one lacked business capacity; that the family was a united one, and entire confidence was reposed in the uncle and brother, and hence the trustees might easily have cheated their *cestuis que trust:*

That the trustees had full knowledge of the future value of the property and desired to possess themselves of it at the lowest possible price, and, therefore, determined not to divide by partition, but to sell; and purposely sold at a time when the real estate market was prostrated and the building business so depressed that there was no demand for bricks, notwithstanding they had ample power to change the time of sale if circumstances rendered it necessary or desirable; and advertised and sold squares 95 and 96 as a brick yard as a means of reducing the price, although the property was worthless as a brick yard and there was no demand for bricks, or for real estate in large quantities; and that these squares were sold as an entirety in order to enable the trustees to buy at a less price than a sale by subdivision would have produced, and in this way a loss occurred of not less than $15,930.87; that square 111 was sold as an entirety, when it should have been sold in lots, and this resulted in a loss of $6061.98; that the difference between what these squares actually realized and what they should have, was not less than $22,092.85, or a loss to the eight heirs of John Hopkins of $11,046.42½:

That "these were frauds prepetrated secretly under such circumstances of confidence inspired by the trustees, as to prevent these owners from discovering them," and this is alleged to be established; (*a*) By the employment of Chapman to make the purchase; (*b*) by the deed to Chapman reciting a consideration of one dollar, and the deed of Chapman to George W. Hopkins, "having the false recital" that Chapman had sold him square 111 for $9093.42, and that to George W. and John S., "having the false recital" that Chapman had sold to them squares 95 and 96, and parts of 94 and 110, for $10,842.24; (*c*) by the fact that the deeds were not recorded until November 16, 1864:

That in order to "give a semblance of judicial sanction to

their acts and further deceive appellees," the trustees went into the orphans' court, and by *ex parte* proceedings had their account passed upon, although the court had no jurisdiction:

And further, that appellees were ignorant of the purchase of the property by the trustees until so informed by their attorney a few days before the institution of this suit; that it had been represented to them that a bricklayer had bought it, of whom their uncle and brother had subsequently purchased; and that it was represented to them by the trustees that the sale was *bona fide*, and that the property had brought all it was worth at the time. It is insisted that the evidence discloses an actual hindrance and impediment to the appellees' discovering their rights, caused by the fraudulent assertions of the trustees that the property brought its full price, and that the sale was particularly conducted for the interest of the heirs. And it is earnestly urged that when the confidential relation of trusteeship and kinship exists, if the trustees and kinsmen inform those for whom they act that their administration has been honest and faithful, when that is not the fact, that constitutes such fraudulent concealment as excuses laches.

It will be perceived that the main charge of fraud in fact consists in an alleged conspiracy to obtain the property for less than it was worth. The claims that the sale was fixed at an unpropitious time and that the squares should have been subdivided and sold in lots, go to the adequacy of the price. If there were no such conspiracy, the specific charge falls to the ground, and if all the circumstances relied on to sustain it were actually known or the appellees were chargeable with such knowledge, then it comes too late. And if they were fully informed that the trustees purchased, and the latter made no false representations in relation to the sale, which misled them, the attempted explanation of the lapse of time as bearing on the purchase by the trustees themselves also fails.

We can hardly see how appellees can now be permitted to plead ignorance as to the time and manner of the sale, the prices brought, the deeds to and from Chapman, and the settlement of the account. And if they are held to knowledge

on these points, the question in either aspect becomes reduced to the inquiry whether they knew or might have known that the trustees purchased the property, or were kept in ignorance by any false representations. But in answering this inquiry it is perhaps desirable to look somewhat into the basis of these charges.

We do not understand it to be contended that the trustees were bound to carry the John Hopkins half, or attend to the support of his children, or any of them, out of the brick business or otherwise, indefinitely.

By his will, after certain bequests, John Hopkins had devised his property to his brother and son in trust, "to carry on the brick-making business as now conducted by my said brother George W. Hopkins and myself in Washington City, D. C., said business to be under the direction of my said brother, George W. Hopkins, assisted by my said son, John S. Hopkins, as clerk, for which he is to receive a regular stated salary;" and further, to receive the income of the estate and business or the testator's portion, and apply the same to the payment of his debts and funeral expenses; of a reasonable salary to John S. Hopkins, as clerk; and the reasonable expenses and support of the testator's family and the education of the younger members thereof. "And upon further trust, that my said trustees shall (where, in their judgment a sale of the real property owned by me and my said brother, George W. Hopkins, or any part thereof, or of the brick-kilns and the materials or implements thereunto belonging, or of said business, is essential or necessary for any cause whatever or would be advantageous) sell and dispose of at public or private sale, at such time or times after such notice and upon such terms as they may deem most for the interest of my estate, and by proper conveyances convey the same to the purchasers, who, having paid his or her purchase money to my said executors, shall be under no obligation to see to the application thereof under the trust of this, my will, nor answerable for the misapplication of the same." Surplus income and proceeds of sales were to be reinvested, or advanced to such of the children as might need or deserve the same. And the will further pro-

vided "that upon the arrival of my daughter Alice to the age of eighteen years, which will occur on or about the first day of May, 1864, my estate of every kind shall be divided by my said trustees and executors among my children."

But the trustees were invested with power to make an earlier disposition in their discretion, as above shown, and by the further clause:

"I greatly desire, as already stated, that my family shall remain as it now is, without change or modification or sale or valuation of the furniture or slaves until the said division of my estate, and that it shall until then be supported by the brick-kiln business as though I were living, and as I believe the squares and lots of ground owned by my brother George and myself, is now and will continue to increase in value, I desire, if possible, that said land may be kept unsold and undivided until as above stated, as it will thus be greatly to the advantage of my family; but as circumstances, now unforeseen, may make a change necessary or desirable, I cheerfully trust in the prudence and discretion of my said trustees, and I give them full power as above to exercise their judgment as circumstances may arise, making it proper to dispose of said land and business, or to change and alter the same, believing that they will have the comfort and welfare of my family and their relatives much at heart."

It is unnecessary to consider the rights and powers of George W. Hopkins as surviving partner. The trust was accepted, the business carried on, the children assisted and supported, and the land kept unsold and undivided, (except certain lots in square 110, which were disposed of in 1859,) "until as above stated," that is, until Alice attained the age of eighteen, which was April 13, 1864, when it became the duty of the trustees to divide the testator's estate of every kind among his children.

To divide this real estate required a partition as between George W. and the estate, and thereupon a partition of their half as between the testator's children. To sell an undivided half would probably prove disadvantageous, but if George W. allowed his half to be sold with the other so that complete title could be given without subsequent legal proceedings, the

trustees apparently concluded a sale would be the best mode of arriving at a division. It is impossible to say that there was anything unreasonable in such a conclusion.

There is nothing, then, in the trustees dividing at the time specified by the testator, and resolving to do this by the ordinary method of a sale, which gives color to the charge of conspiracy.

Squares 95, 96 and part of 94 were used in the brick business, and George W. Hopkins lived on square 111. He owned one-half of these squares, and it was natural that he should desire to own the whole of his homestead, and that he and his nephew should wish to own all that portion used in the business in which they were engaged. But it is not, therefore, to be assumed that in the gratification of their wishes in this regard they would commit deliberate fraud upon the brothers and sisters of the one and the nephews and nieces of the other. It is not denied that George W. and John S. Hopkins were honest and reliable and sustained a high reputation for integrity; and if fraud or breach of trust ought not lightly to be imputed to the living, the evidence of fraud should be convincing before the sanctity of the grave is disturbed. Yet here the stress of the argument that the deceased were guilty is thrown upon the alleged inadequacy of price claimed to have been the result of selling squares 95 and 96 as an entirety and square 111 in the same way. That they brought full prices as squares is satisfactorily established by the evidence, and scarcely disputed.

The condition of the squares in that part of the city, including squares 94, 95, 96, 110, and 111, in May, 1864, is described by one of appellees' witnesses as just laid out "in old fields, as it were; you could hardly tell one street from another. Very rarely you would see any improvement on any of them, unless it were some old shanty which had been built there probably thirty or forty years. . . . All these squares were pretty much set out in nurseries, you will remember, but I do not think any nurseries were on these squares at that time. I think they laid out in a common. Q. Were the streets graded? A. I think not; I do not think there were

any streets graded there. Q. How many houses can you recollect in the neighborhood of what is now known as Dupont Circle? A. There were very few houses in that neighborhood. I want to state that there were very few. George Hopkins's house was there at the time, but houses were very scarce, I tell you. There may have been some old landmarks torn away that may have escaped my memory, but the whole place laid out in old fields and commons. I cannot recall any houses, but farther out, near the boundary, there were some houses. I remember a house right at the head of Twentieth Street. It is there still. Well, they were scattered around; probably you would have to walk two or three squares to find houses. Q. Were there any pathways to get to the houses? A. I think there was a road which led to Holmead's burying ground, a kind of highway known as the burying-ground road. I went out that road when I was in that part of the city; but, as for squares, I do not think anybody could tell one square from another by going there, so far as distinguishing them by roads or anything of that kind is concerned."

Other evidence is to the effect that in 1866 and 1867 there were no streets open running north of K and west of Fourteenth Streets except Twentieth Street; that no street had been brought to anything like an established grade at that time, though Twentieth Street was graded a portion of, and perhaps all, the way; that none of the streets running east and west were opened in that locality west of Seventeenth or Eighteenth Streets except a portion of L Street; that no streets north of L Street were opened on any established grade across Twentieth Street; that M Street was very nearly on the grade about Twentieth Street, but not at Twenty-first Street; that there were scarcely any blocks or any of the streets opened north of L and west of Fourteenth Streets in that portion of the city in 1867, and Massachusetts Avenue had not been opened, nor P, nor O Streets; that the property in that section of the city west of Dupont Circle, "a good deal of it, or some of it, was enclosed and used for cultivation, for pasturage; a portion of it was used for the manufacture of brick, and other portions were laid out in pasturage for hogs and cows and goats, etc.

. . . A person could tell about where the streets were, but not by any defined lines. There were roads passing here and there up Massachusetts Avenue, which was barely passable. There was no bridge over Slash Run at Massachusetts Avenue." There were no water mains nor sewers. Brick kilns were on square 95, and sheds and yards for drying bricks were on square 96. The surface of the squares was rough and irregular and full of holes made in digging for brick clay. One witness said that in the middle of those squares "you might have buried 'Jumbo,' and you could not see him." How far the squares might be above grade when the streets were opened seems to have been regarded as in doubt, notwithstanding the books of the surveyor's office gave the future grades.

It was in proof that the manufacture of brick was carried on there "until 1872 or 1873;" and that square 96 was "used for digging clay for the manufacture of brick, in 1867, 1868, and 1869, along about that time." The principal witnesses concur that the business of brick making was carried on after the sale as it had been before.

Evidence was adduced on behalf of appellees tending to show that there was but little brick clay on these squares after 1864; that the concern gathered it from the streets; that the two kilns on square 95 were old and out of shape; and that the brick the Hopkins made was too soft for pavements. But the fact remains that the brick business was carried on upon these squares for years after the sale. They were thus advertised as a "brick yard, believed to be one of the best located in the District, having both Washington and Georgetown for a market, an abundance of fine clay, brick and tempering sheds, kilns, offices and all necessary outfit for a first-class brick yard."

There is evidence of probable ground for the belief that the squares would in any view bring better prices by being sold in blocks; but apart from that, we think the inference of bad faith because they were sold as a brick yard, a strained one. Conceding that the judgment of the trustees was influenced by their own intention to continue the business, that is not enough to sustain the assumption of actual fraud in the matter

of the prices. And the knowledge of the parties now complaining, of the continuance of the business, is admitted. So, as to square 111, that was advertised as "improved by a large brick dwelling-house and back buildings, carriage-houses, stabling, etc., the whole enclosed and beautified with fruit and ornamental trees and shrubbery."

The reason is thus given for selling it as an entirety, and it was an obvious one. As we have said, it was George W. Hopkins's home, and most of the children of his brother John were living there with him. He naturally desired to own it, not for subdivision, but for a residence. The house is shown not to have materially enhanced the value; and the price of nine cents per square foot was a full price. Several years after he did subdivide a part of this square, and sold the lots constituting the north half for eleven cents per square foot. This was nearly five years after the sale. The first subdivision of six of the original lots was August 6, 1868, and the second, of the remaining six, was November 7, 1870.

The Board of Public Works created by the act of Congress of February 21, 1871, thereafterwards opened up and reclaimed the territory in this quarter of the city, and many thousands of dollars were imposed in special assessments upon all this property and paid by the owners. The property had increased in value between its original purchase and the sale to a considerable extent, as the prices at the sale showed, but twenty years thereafter these values had increased several thousand per cent. Square 96 was not subdivided until October 20, 1877, more than thirteen years after the sale.

Undoubtedly the argument is ingenious and forcible, that squares 94, 95 and 96 were of about the same value, and that if the lots in square 94 brought a higher price per square foot, the lots in the other squares, if subdivided, would have done so also; but considerable differences between square 94 and the others are shown, and it appears that the five lots in 94, purchased at the sale by August Miller, were then occupied by him as a garden; and upon the issue of fraud in fact an intentional attempt to acquire the property at an inadequate price cannot safely be inferred upon equivocal and conflicting

theories as to why one piece sold at a better price than another. Taking all the evidence together, even if it were now seen that if the brick business had been abandoned and the property subdivided, more might have been realized, fraud is not to be imputed because this was not done.

No exception seems to be taken for want of publicity in the sale. The advertisement was published in the National Intelligencer, the Evening Star and the Daily Chronicle from April 20, 1864, to May 10, 1864, daily. The sale was conducted by J. C. McGuire & Co., an established firm in the conduct of such sales in 1864, and apparently by Thomas J. Fisher, then a member of the firm, who, however, by reason of the lapse of time and through the distractions of a large business, testified that he did not have the slightest recollection of making it. The proofs indicate that there were many persons present and more than one bid, perhaps three. An account of the sale to Chapman and others and the prices realized appeared in the Star the next evening.

The deeds to Chapman were for a nominal consideration, while the consideration in each of the deeds from Chapman to George W. and John S. jointly, and to George W., was the aggregate amount for which Chapman had bid in the property described in the deeds respectively. They were all simultaneously recorded on the 16th of November following, and spoke for themselves, carrying upon their face the evidence of the transaction as being a purchase by the trustees through Chapman. Thus viewed, their recitals were not false. If the consideration in the deed to Chapman had been the amount of his bids there would have been more ground for such a suggestion. It was the trustees who paid, and the deeds showed it according to the fact. The delay in recording the deeds is of no moment. If the evidence shows, as we think it does, that the purchase was openly announced in the family of George W. and John, it would be unreasonable to ascribe to them the motive of concealment in neglecting to record the deeds before they did. The argument as to confidence reposed is inconsistent with such an idea, and meditated fraud would have put the conveyances on record at once.

It is said that the accounting in the orphans' court was had in order to "further deceive appellees." We find that on the 12th of July, 1864, citation was issued against the executors to settle an account, and that on the 23d of August the court appointed the 13th of the succeeding September for the final settlement and distribution of the personal estate of the deceased, and issued the requisite legal order for publication to be inserted once a week for three weeks in the National Intelligencer prior to said day, which was accordingly done. No proceedings took place on September 13, 1864, and on January 7, 1865, another citation was ordered to be issued against George W. Hopkins, which was, however, as was the first one, returned without service. On March 28 the accounting was had, as hereinbefore stated. Perhaps there was undue delay in this accounting, but the proceedings in court were regularly conducted and the shares of the devisees ascertained and duly receipted for by them. The account shows that the proceeds of the business and of the sales prior to May 10, 1864, were included, though not itemized; and it is certainly too late to open up that account as such, and especially in the absence of evidence of any fraudulent charges or omissions. Indeed, the account can hardly be said to be attacked on any ground inherent in itself, but simply in order to obviate its operation as a settlement, precluding any further investigation of the matters complained of. The executors accounted for half the proceeds from the sale as personalty, treating the real estate as having been acquired and used for partnership purposes and as being partnership property. We are at a loss to conceive how the conspiracy charged is sustained in any degree by the mere fact that the executors accounted.

It appears also that after the conveyance by Chapman to George W. and John S. Hopkins as individuals, they conveyed, between July 26, 1865, and March 4, 1871, by four separate deeds, lots 16, 19, 39 and 17, in square 110, to different purchasers, and that the first, second and fourth of these purported to be given by them as executors, while the third did not. These deeds were drawn by the same scrivener who had been in the habit of preparing deeds for George W. and

John S. Hopkins, as executors, before the sale. Between the dates of the first and last of these four deeds, George W. Hopkins, as an individual, conveyed a number of lots in square 111, in which John S. Hopkins did not join, and between the date of the fourth deed and April 30, 1875, George W. and John S. Hopkins, as individuals, conveyed by four separate deeds, at different times, four lots in square 110 to different purchasers, while George W. Hopkins between the same dates conveyed a number of lots in square 111. We think the form of the three deeds was obviously a blunder of the conveyancer, and that it cannot rightly be laid hold of as showing that the deeds were intentionally so drawn to conceal the fact that George W. and John S. Hopkins owned the property therein named as individuals, or that they purposely, for that reason, continued to deal with portions of the real estate they had purchased, as if they still held it as executors and trustees.

We are brought, then, to consider whether appellees were ignorant of the purchase of the property by the trustees, and whether there were any false representations on their part which misled them.

George Washington Hopkins and Isaac H. Hopkins were at the sale, and Mrs. Lilburn, Mrs. Wailes, Mrs. Early and Alice were at the house of George W. at the time it took place, Mrs. Lilburn having been sent for to come up. The National Intelligencer was taken at the house, and the advertisement had been read, certainly, by Mrs. Early, some time before. George Washington said to a witness, while Chapman was bidding: "He is buying for Uncle George;" and Isaac H. was "the first to come in from the sale; and he said that Chapman had bought the property for Uncle George W. Hopkins and John, and he said they had paid as much for it as the property was worth." The subject of the sale, and that George W. and John S. would purchase, was frequently talked over as well before as after the sale, and the evidence demonstrates that there was no secrecy or concealment about it.

The interesting fact is testified to by appellees' solicitor that

he brought to the attention of his clients the case of *Landsdale* v. *Smith*, 106 U. S. 391, and that he "read to them the rule of law that, in order to excuse long delay in the prosecution of a suit, it must be shown by the plaintiff that the delay was caused by some hindrance, impediment or concealment of a party in possession. I think I read it over to them half a dozen times and tried to explain it to them." In that case it is stated: "It has been a recognized doctrine of courts in equity, from the very beginning of their jurisdiction, to withhold relief from those who have delayed for an unreasonable length of time in asserting their claims. In *Wagner* v. *Baird*, 7 How. 234, 258, it was said that 'long acquiescence and laches by parties out of possession are productive of much hardship and injustice to others, and cannot be excused but by showing some actual hindrance or impediment, caused by the fraud or concealment of the party in possession, which will appeal to the conscience of the chancellor.'"

Nevertheless, although thus admonished, the testimony of the four sisters, Mrs. Early, Mrs. Lilburn, Mrs. Wailes, and Mrs. Hall, (who appeared to be intelligent and well educated,) if treated as competent, falls far short of overthrowing the evidence on the part of the defendants that they were acquainted with the fact that the purchase was made for the trustees. No one can carefully peruse their evidence without being impressed with the belief that they were aware of that fact. Three of them testified that they knew their uncle and brother had become purchasers of the property from a bricklayer, or Chapman, who bought at the sale, not that they did not know or hear that he bought for the trustees. Mrs. Hall, who was but just eighteen at the time, denied that she knew who bought the property until March, 1884, but said that she had no doubt that if she had applied to her uncle or brother for information in regard to the estate they would have given it. Mr. Luttrell testifies that in 1876 she told him that Chapman bought for George W. and John S., and in 1867 and 1868 she, or her husband for her, received and receipted for the full amount of her share, (which under the will was not to be paid over until she reached twenty-one,) on an account rendered. All these

complainants saw the brick yard being carried on as before, and George W. and John S. continuing to exercise acts of ownership over the property. They all had no doubt that either of the trustees would have given them any information they desired, and they all evidently had no objection to the trustees' becoming the purchasers in and of itself.

The following is from the testimony of Mrs. Early:

"Q. I understand you now to say that you would not have objected to George W. and John S. Hopkins buying the property had they given a fair price for it? A. No, sir; I would not have objected to it. Q. And your whole complaint is that you were told they did not give a fair price for it? A. That justice was not done us. Q. I understand your complaint now is that George W. and John S. Hopkins did not give a fair price for what they bought? A. Well, I think they got as much as they could for the sale at the time. Q. You had no objection, as you stated yesterday, to George W. and John S. Hopkins buying it? A. No, sir. Q. And you did not care who bought the property so that you got a fair price for it? A. No, sir."

The force of this admission is attempted to be broken by a letter to Mrs. Early from her attorneys, calling her attention to her answer as to the trustees getting as much as they could at the time, and among other things notifying her "that unless this statement was a mistake, honestly made, and as honestly corrected, we shall feel obliged to ask the court when the case shall be called for hearing, to consider us as no longer counsel for your interest;" and her reply that she meant "what I thought the day of the sale, but since then I do not think they got as much as they could for the property," etc. This correspondence may have soothed the susceptibilities of counsel, but it is not evidence, and if it were, it fails to remove the impression that Mrs. Early believed that a full price was realized.

It will subserve no useful purpose to go more minutely into the evidence. We regard the conclusion as irresistible, that the fact that the purchase was made for and by the trustees was known to all of these children at or about the time of the sale.

The excuses for want of diligence in the premises set forth in the bill amount only to this — that in February, 1884, an attorney undertaking the investigation of William's case, which had been in hand since 1873, "discovered for the first time that Chapman had never paid one dollar of consideration for said land, but had bought the same for and on account of said trustees, and that the sale was fraudulent and void;" and that thereupon the plaintiffs' attention was called to this so-called discovery. The point seems to be that complainants' counsel concluded from the conveyances, as he very well might, that the trustees had bought at their own sale. This was true, and was an obvious deduction from the deeds, but it did not therefore follow that those conveyances were absolutely void, nor that they could be held so nineteen years after they were executed, if the complainants had known or should have known that fact during the intervening time, or a large part of it.

Whether appellees were informed, before 1884, of the rule in relation to trustees purchasing at their own sale, is immaterial. Probably George W. and John S. Hopkins were unacquainted with it, and made the purchase through Chapman because obliged to in order to pass the legal title. The vital question is, Did appellees actually know, or were they chargeable with knowledge of, the fact of the purchase itself? What we have said in effect disposes of the suggestion that by false representations appellees were misled into believing that the sale was fairly conducted when it was not, and that this constitutes a sufficient explanation of the lapse of time.

The bill averred that George W. Hopkins assured Mrs. Lilburn, when she expressed surprise that the property had brought so low a price, that the sales were "each and all *bona fide*." But the testimony of Mrs. Lilburn was not quite that. She testified that when her uncle came in from the sale, she remarked to him: "'Uncle George, is the land all sold?' He said: 'Yes.' I said: 'You did not get but very little for it.' He said: 'No; it was a *bona fide* sale.'" In addition to this, counsel refer to the evidence of Mrs. Dashiell on cross-examination, where she said that she understood the property

brought its full value, and a great many people thought it brought more, and was asked: "Q. It was looked upon, then, as a sale particularly conducted for the interests of the heirs? A. Yes, sir; it was;" and of the widow of John S. Hopkins, that, "My uncle, George W. Hopkins, and my husband, John S. Hopkins, told the family that they were going to buy the brick-yard property; that they would give as much for it as any one else; and none of them objected at all;" and that of other witnesses, that there was no dissatisfaction expressed and no suspicion entertained.

Upon testimony of this kind, we cannot hold that either of these deceased trustees made statements with the view to induce their *cestuis que trust* to act upon them, or that appellees were lulled into repose by any affirmative conduct on their part. Still less does this class of evidence tend to show an effort to conceal from appellees that the trustees had purchased at their own sale.

By the amendment made in June, 1885, these trustees were charged with fraudulently appropriating one-half of the proceeds of lots 3, 4 and 5 of square 67, known as the Mix lots, to the benefit of one of them. The evidence showed that John and George W. Hopkins carried on the business of brick-making on square 67, using the clay derived therefrom, before they occupied squares 94, 95 and 96, and that the brick business had been carried on on that square, before their occupancy, by a firm, one of whom was named Mix. It further appeared that John Hopkins had been engaged in business on his individual account and had failed, and that he had had transactions in which George W. was not interested. And one of his daughters, Mrs. Early, testified, under objection, to a conversation between her father, John Hopkins, shortly before his death, and Mr. Mix, in which Mix told Hopkins that he would give him a deed for some lots. On October 27, 1869, Charles E. Mix and wife, for the nominal consideration of $5, conveyed to George W. and John S. lots 3, 4 and 5 in square 67 in fee simple, "in trust, nevertheless, to have and to hold the same for the benefit of the estate of the late John Hopkins, upon like trusts and con-

ditions, and with all the rights and powers contained and vested in the said parties of the second part under and by virtue of the last will and testament of the late John Hopkins."

On June 18, 1872, George W. and John S. as executors of the estate of John Hopkins, deceased, and also as trustees under the deed from Mix and wife, conveyed to James M. Latta said lots 3, 4 and 5 for $6784. On July 1, 1873, John S. gave to Mrs. Early a paper written by himself, containing a statement by the trustees of the sale of these lots. This paper was as follows:

"Sales of lots 3, 4, & 5, square 67			$6783 99
"Balance in interest, rents, &c.....			262 10
			$7046 09
"One-half to Geo. W. Hopkins—		$3523 04½	
"Do. J. Hopkins .....7)3523.04½		3523 04½	
			7046 09
"July 1st, 1873.	503.29"		

Prior to this date, two of the nine children of John Hopkins, namely, Levin and Isaac, had died intestate and without issue, and the other seven children were the beneficiaries under the will. According to this account rendered, one-half of the sum for which the lots had been sold to Latta went to George W. and the other half to John Hopkins's estate; and the half of John Hopkins was divided by seven, giving the share of each of the children as $503.29. October 11, 1873, Mrs. Early was paid her share and on the same day signed the following receipt:

"Rec'd of Geo. W. & J. S. Hopkins, executors and administrators of Jno. Hopkins' estate, five hundred & three $\frac{29}{100}$ dolls. in full of all demands due me from the said estate to date.

"$503\frac{29}{100}$. Washington, Oct. 11th, 1873."

November 29, 1873, Mrs. Lilburn, and December 24, Mrs. Hall and Mrs. Wailes, respectively, signed similar receipts for the sum of $503.29 each. George Washington Hopkins had

died intestate, and July 9, 1870, letters of administration had been issued on his estate to Mary A. Hopkins. October 1, 1873, Mary A. Hopkins, the administratrix, gave a similar receipt for George's share of the proceeds, $503.29. December 2, 1873, William M. S. signed the following receipt:

"Rec'd of Geo. W. & J. S. Hopkins, executors and administrators on John Hopkins's estate, five hundred and three $\frac{29}{100}$ dolls. in full of all demands due me from the said estate and also in full of any or all demands due me from the said parties above-mentioned up to this date — Dec. 2d, 1873.

"Washington, D.C.

"$503.29."

George W. and John S. Hopkins have passed away and, therefore, cannot explain the reasons for their action in thus treating these lots as belonging to the copartnership, but they were conversant with the facts and must be regarded as having acted understandingly upon that basis. The square was used by the partnership for partnership purposes, and it is not a violent presumption that these lots were purchased with partnership funds. The question on this branch of the case is, whether by bill filed fifteen years after Mix and his wife gave their deed, and eleven years after the distribution just stated, the heirs of the trustees ought to be held to account for the other half of the proceeds upon the ground that the lots belonged to John Hopkins individually. In our judgment such a conclusion is inadmissible under the circumstances.

The bill averred that the conveyance of William M. S. and his wife to his brother John S., executed June 20, 1860, and recorded July 7, 1860, was fraudulent and void, and procured in pursuance of a general scheme of fraud on the part of the trustees. William was not a party to the suit, but by the decree the deed seems to have been ignored, and Sarah E. Hopkins, William's wife, treated as assignee of his share. It is admitted that William signed this deed and delivered it to his brother, and we think it cannot be properly claimed that he was at the time mentally incompetent to execute it. It is

true he was in the Government Hospital from August 13, 1864, to September 2, 1864, and from January 19 to March 23, 1865, and also from September 19, 1868, to August 6, 1870, for dipsomania, the last time being after he had received a blow on the head; but there is much evidence that he was a man of intelligence and business capacity when not under the influence of liquor, and if there were any mental failure after September, 1868, that is not material here. He was called as a witness on behalf of complainants, and testified that his brother persuaded him to sign the deed; that he did not acknowledge it; that he signed his wife's name to it at the suggestion of his brother; and that she never knew about it. January 28, 1864, William conveyed to Christopher Ingle, for the benefit of his wife, all his interest in his father's estate, and the deed was recorded January 29, 1864. Ingle was not a party to the suit. On the margin of the book in which this deed was recorded is an entry, according to the custom in the recorder's office, to the effect that the original deed was delivered to the beneficiary in May, 1864.

Counsel on both sides refer to certain correspondence between John S. and Sarah E. Hopkins in the summer of 1873, in which both these deeds are mentioned. As to that to John S., Mrs. Hopkins wrote: "What William did I do not know, and if I signed it I signed it not knowing what it was, (which fault was not yours,) for the deed of trust in which William gives me the portion of his father's estate is duly recorded, and was January 29, 1864." In her testimony in chief, Mrs. Hopkins denied that she had joined her husband in a deed to John S., and asserted that she had never signed but one deed, which was a deed to sell a small house, in 1858 or 1859. She remembered that one of the magistrates who took the acknowledgment was named Donn. It appeared that the acknowledgment of the deed of 1860 to John S. was made before two magistrates, one of whom was Mr. Donn, while he was not one of the two justices of the peace before whom the deed of 1859 was acknowledged, and Mrs. Hopkins some days afterwards explained the reference to Mr. Donn as arising from a remark of counsel. However, upon cross-examination, she

testified that she was afraid she would not recommend any one to trust her memory twenty years back; and that as to the deed, she still did not recollect anything but the one deed, and yet she might have signed another. She had also completely forgotten her knowledge of the existence of the deed of January 28, 1864, to Mr. Ingle, to which she had referred in her letter of 1873, and which the record in the recorder's office showed had been delivered to the beneficiary in May, 1864.

We understand it to be conceded that when the evidence was taken in this suit both of the justices of the peace before whom the deed of 1860 was acknowledged, as is admitted by the bill, were dead; and, in the absence of evidence of fraud or collusion on their part, their certificate ought to prevail. Mrs. Hammond stated in her answer, upon information and belief, that this deed of 1860, though absolute on its face, was availed of by her father solely as a security and for the protection of his brother, the said William M. S., who was addicted to intoxication, and that the full share of William M. S. in the estate of his father was duly accounted for and paid to him. In the settlement of March 28, 1865, William's share, namely, $2667.60, was receipted for by John S., the latter presumably claiming the power to do this by virtue of William's deed to him. On March 29, 1865, William was credited with $2667.60 in an account opened before that time in a book kept by George W. and John S., and that account showed that there was paid to him, on or before June 5, 1865, in instalments, the aggregate sum of $2667.60, after deducting $1641.01, made up of $1579.49 due John S. and $61.52 for bill of furniture. On December 2, 1873, William receipted for $503.29, his share of the purchase money from the Mix lots, and in full of any or all demands to date. This amount is shown on the same account, and is made up of nine items of cash paid him, commencing with January 6, 1872, and closing with December 2, 1873. This was not a bill to set aside the deed, nor is it framed in the aspect of repudiating the payments to William as made in fraud of his wife. We do not care to comment upon the testimony of William in this

connection. We think complainants failed to make out their charges of fraud, and that apart from that, the defence of laches interposes an insuperable bar to contention upon this subject.

We perceive no adequate reason given for the delay in the attack upon this deed, nor in respect of the proceeds of the Mix lots, nor in the assault upon the account stated and settled in the orphans' court in 1865. We fail to find any ground assigned for the ignorance of plaintiffs of the proceedings upon the executors' accounting, or why they received and receipted for their distributive shares as determined thereby. Indeed, all the matters relied on to justify the imputation of fraud were known or could have been known to the plaintiffs just as well at the time when they transpired as when the bill was filed. No facts are shown of which plaintiffs were ignorant. No discovery was made which might not have been made during the nineteen years. It is true that the children of John Hopkins had confidence in their brother and uncle; but as for nearly twenty years they apparently saw no reason for believing that that confidence had been misplaced, it would require much more convincing evidence than this record affords to justify the conclusion that they had been in fact the victims of imposition. Indeed, we do not understand the testimony of the survivors as affirmatively questioning the integrity of the trustees.

Mr. Justice Merrick, in his well considered opinion in this case, after saying that "the question then reduces itself to the naked question whether the doctrine of a court of chancery, with regard to the necessity of the repose of society, is not sufficient to prevent the opening of this inquiry under these circumstances," proceeds to examine the two classes of cases to which the doctrine is applied, that of constructive fraud in the dealing by a trustee with the subject of the trust through an intervening person for the acquisition of the legal title, and that of actual fraud and concealment, and points out the greater liberality in respect of lapse of time in the latter class than in the former. Where there is no fraud in fact, he says:

Opinion of the Court.

"If the party, in view of all the facts of the case, has slept upon his rights, a court of chancery will not intervene; and in measuring laches there are two extremely important considerations always taken notice of by a court of chancery, which limit and narrow the measure of time which otherwise would be liberal. Where there has been no change of circumstances between the parties and no change with reference to the condition and value of the property, a court of chancery will run very nearly if not quite up to the measure of the statute of limitations as applied in analogous cases in a court of law. But where there has been a change of circumstances with reference to the parties and the property, and still more where death has intervened, so that the mouth of one party is closed, and those who represent his interests are not in a predicament to avail of the explanations which he might have made, out of the charities of the law and in consideration of the fact that fraud is never to be presumed, but must always be proved and proved clearly, the courts limit very much, in such cases, the measure of time within which they will grant relief, because the presumption comes in aid of the dead man, that he has gone to his account with a clear conscience. In this case one of these trustees, the survivor, remained in active life and energy for nineteen years after the alleged technical fraud is supposed to have been committed. There was no challenge, during that time, of the transaction. Had there been the law has a right to presume, and does presume, that he would have had opportunities of explaining these transactions and vindicating himself, which opportunities are now lost. The counter-presumption now arises, that there has been delay with a view to have the undue advantage of evidence on one side no longer capable of explanation on the other.

"This is this case stripped of all the surroundings with reference to it, stripped of all the imputations and suspicions piled one upon another with artful ingenuity, arising out of a number of minute circumstances, no one of which has in itself, apart from others, any significance. The effort has been made, I say, under such circumstances, to impute fraud.

"But it is very remarkable that, while the circumstances of

themselves do not carry any persuasive evidence of fraud to the trained judicial mind, the parties themselves who are impeaching the transaction, the surviving children who had knowledge of what occurred, in their evidence in this cause and under all the temptations to strain or overtop their testimony do not to-day impute any actual malversation to either of the trustees. The utmost they say is that if they have rights they want them. They never did call in question, in the lifetime of the trustees, the integrity of the trustees: they do not affirmatively call it in question to-day. They simply say, at the uttermost, that if they have rights, as has been suggested to them, in regard to the possibilities of a legal administration of a trust in the manner in which I have stated, they want those rights. Now, under all these circumstances, with all this lapse of time, with all the knowledge they had then and there while the transactions were fresh, with all the temptations now in their own minds to pervert the facts, there is no one of those who are at all reliable in testimony — and I do not include W. M. S. Hopkins in this remark — who ventures to impute actual fraud to the trustees whose estates they are now calling in question."

We concur in these views. In all cases where actual fraud is not made out, but the imputation rests upon conjecture, where the seal of death has closed the lips of those whose character is involved, and lapse of time has impaired the recollection of transactions and obscured their details, the welfare of society demands the rigid enforcement of the rule of diligence. The hour-glass must supply the ravages of the scythe, and those who have slept upon their rights must be remitted to the repose from which they should not have been aroused.

The decree is reversed, and the cause remanded, with directions to dismiss the bill.

THE BARBED WIRE PATENT.[1]

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

No. 128. Argued December 16, 17, 1891. — Decided February 29, 1892.

The invention secured to Joseph F. Glidden by letters patent No. 157,124, dated November 24, 1874, for an improvement in wire fences, involved invention, and the patent therefor is valid.

Courts incline to sustain a patent to the man who takes the final step in the invention which turns failure into success.

When an unpatented device, the existence and use of which are proven only by oral testimony, is set up as a complete anticipation of a patent, the proof sustaining it must be clear, satisfactory and beyond a reasonable doubt.

THIS was a bill in equity for the infringement of letters patent No. 157,124, issued to Joseph F. Glidden, November 24, 1874, for an "Improvement in Wire Fences." In his specification the patentee stated that "this invention has relation to means for preventing cattle from breaking through wire fences; and it consists in combining, with the twisted fence-wires, a short transverse wire, coiled or bent at its central portion about one of the wire strands of the twist, with its free ends projecting in opposite directions, the other wire strand serving to bind the spur-wire firmly to its place, and in position, with its spur-ends perpendicular to the direction of the fence-wire, lateral movement, as well as vibration, being prevented. It also consists in the construction and novel arrangement, in connection with such a twisted fence-wire and its spur-wires, connected and arranged as above described, of a twisting key or head-piece passing through the fence-post, carrying the ends of the fence-wires, and serving, when the spurs

[1] Three appeals relating to this patent taken from decrees of the Circuit Court for the Northern District of Iowa, were consolidated and argued together, viz.: No. 128, *Washburn & Moen Manufacturing Company* v. *The Beat 'em all Barbed Wire Company;* No. 129, *Same* v. *Norwood;* and No. 130, *Same* v. *Wiler.*

become loose, to tighten the twist of the wires, and thus render them rigid and firm in position."

His claim was for "a twisted fence-wire having the transverse spur-wire D bent at its middle portion about one of the wire strands *a* of said fence-wire, and clamped in position and place by the other wire strand *z*, twisted upon its fellow, substantially as specified." The following drawings accompanied the specification:

GLIDDEN PATENT.

Fig. 1.

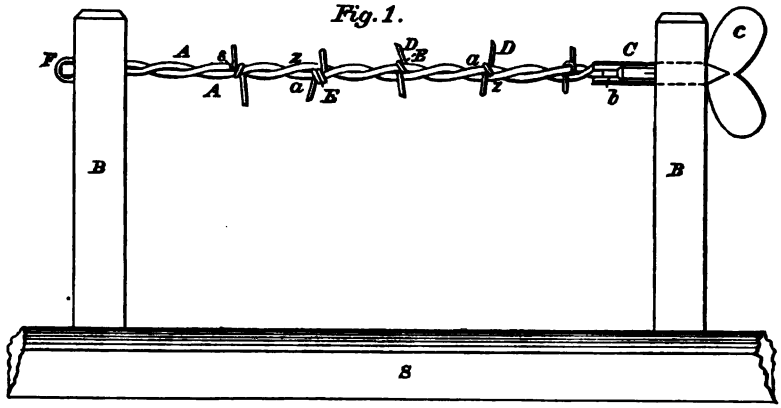
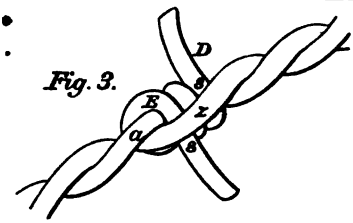


Fig. 2.

Fig. 3.



The bill also relied upon certain decrees obtained in other districts against other defendants, which were claimed to have established the validity of the patent. The answer denied that, in view of the state of the art at the time this patent was issued, there was any invention in the device described, and averred that the decrees set forth in the bill were collusively and fraudulently obtained; and also set forth an opinion of the Circuit Court of the United States for the Northern Dis-

trict of Illinois to the effect that the patent was void for want of novelty. *Washburn & Moen Mfg. Co.* v. *Haish*, 10 Bissell, 65.

Mr. John R. Bennett for appellants.

Mr. A. H. Blair and *Mr. William H. Singleton* for appellees. *Mr. D. B. Henderson* filed a brief for same.

Mr. Justice Brown delivered the opinion of the court.

No serious question is or can be made regarding the infringement in this suit, the defendants relying solely upon the want of novelty. To determine satisfactorily the question whether there is involved in this device sufficient of novelty to support a patent, it is necessary to consider somewhat at length the progress which had been made in constructing barbed wire fences prior to the issue of this patent, as it appears both from the face of the prior patents themselves and from the oral evidence introduced by the defendants tending to show an unpatented use of such device before the application was made in this case.

(1) The use of wire fences, composed either of a single wire, or of two or more wires twisted together, antedates by many years the barbed feature of such fences. But, either by reason of their comparative invisibility or their weakness, they proved an insufficient protection against cattle, and fell largely into disuse. Something was needed, not so much to strengthen them, as to deter cattle from encountering them or testing their strength. Natural hedges of thorn, which in effect contain the principle of the barbed wire, have been employed both in this country and in England from time immemorial. Fences of other materials and various forms had been armed with pickets, spurs, iron points, spikes, sharp stones, or bits of broken glass inserted in plaster, but prior to 1867 no one seems to have conceived the idea of arming wire fences with a similar protecting device. In July of that year, however, one William D. Hunt took out a patent for arming the wires with a series of small spur-wheels, their spurs being sharpened so as

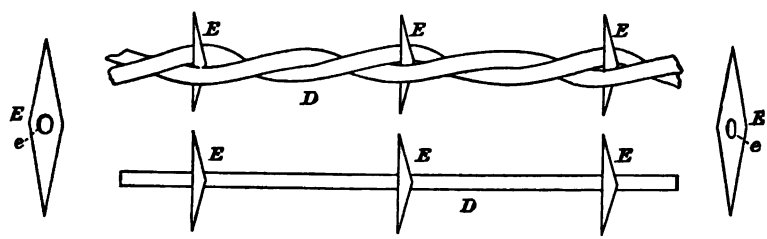
to prick readily. These wheels were provided with openings at their centres through which the wire passed, fitting it loosely so that the wheel would revolve easily upon it. There was a provision sometimes used and oftener not, for keeping the spurs in their places, and at suitable distances apart, by means of flanges. This was obviously a crude and unsatisfactory device, and never seems to have gone into general use. The spurs were small serrated wheels revolving loosely about a wire, aided by flat bits of metal to render them more readily visible, and kept in place, if at all, by a clumsy and expensive flange.

In the same year, and about four weeks before the patent to Hunt, although his actual invention was antedated by Hunt in point of time, Lucien B. Smith took out a patent for a wire fence, having spools of iron or wood strung upon it, each spool being perforated and provided with four spurs projecting radially from them, and so arranged that they would revolve, while they were held in place lengthwise of the wires by slight bends or deflections in the wires at a distance of two or three feet apart, forming short straight lengths of about four inches, upon which the spools were hung. This patent contained the first suggestion of a barb proper, though in a very imperfect form; but it embodied an idea of which the public was not slow to avail itself, and gave an impetus to succeeding inventors, which finally resulted in the barbed fence now in use. Though valuable as illustrating the state of the art, it will scarcely be claimed to be an anticipation of the Glidden device.

The patent of February 11, 1868, to Michael Kelly indicated a decided step in advance of its predecessors, consisting as it did of small flat pieces of iron or steel, cut from a plate by machinery, each provided with a hole corresponding with the size of the wire, though a little larger, so that they could be introduced easily upon the wire, either by proper machinery or by hand. "These pieces," says the patentee, "after being strung on the wire at distances about six inches apart, are compressed laterally upon the wire by a blow of a hammer, or otherwise, so as to flatten the hole *e*, and also correspondingly

flatten the wire at the point where this adjunct is to stand. I term these pieces 'thorns;' and it will be observed that each presents two sharp points. They may be so placed that they will all stand in the same plane; or they may stand irregular in many different planes. I prefer the latter arrangement. The wire thus provided with the sharp points or thorns serves in the ordinary manner, with the addition of possessing an offensive character, which will soon teach cattle to respect it and not attempt to force it." Figure 2 of this patent, a representation of which is here given, undoubtedly contained the idea subsequently developed by Glidden, but there was apparently no method of holding the barb in place, save by a blow of a hammer — at least such seems to have been the opinion of the patentee at the time the patent was originally issued. He

KELLY PATENT.



says of this in his specification: "I can, where it is desirable to increase the strength of the wire, lay another wire of the same or a different size alongside of a thorn-wire, and can twist the two together by any suitable mechanism." No claim was made for this method of construction in the original patent, although it seems to have been made the principal feature of a reissue obtained in 1876, which was not made an exhibit in this case. In this reissue he made a claim for twisting two wires and a series of thorns strung upon one of the wires and held in position by them. In the case of *Washburn & Moen Manufacturing Company* v. *Fuchs*, 16 Fed. Rep. 661, it was held that if this reissued patent were to be considered as covering more than the mode of fastening the plate barbs to the wire in the combination stated, *i.e.* by hammering, and as extending

the use of the twisted wire so as to include its use for the distribution and locking of all kinds of barbs, the reissue was invalid as to such extension, because it was not included within the scope of the original invention. It is evident from this that the use of the second twisted wire for the purpose of locking the thorn was not contemplated by the patentee at the time his patent was originally granted, but was an afterthought suggested by other devices which in the meantime had made their appearance.

A second patent to Kelly, issued November 17, 1868, exhibits a flat wire pierced at intervals of six inches, through which thorns were inserted and locked to the wire by the blow of a hammer or otherwise. This device evidently bears a much more distant resemblance to the Glidden patent than the prior one, and is far from being an anticipation.

The application for the patent in suit was filed October 27, 1873, though the patent was not issued until November 24, 1874. Subsequent to the application for this patent, and on March 14, 1874, Glidden filed an application for an improvement in wire stretchers for fences, upon which a patent was issued May 12, 1874. It is not perceived how this patent could affect in any way the pending application for the later patent. The patentee abandoned nothing he had claimed before, but sought, as an improvement upon the former, to claim a slotted tube midway between the posts, in which was put a coil spring to spread the wires and automatically tighten them and keep them at the proper tension as against expansion by heat and contraction by cold. If the later application had covered the same invention as the prior application for the November patent, the later patent might have been void under our ruling in *Suffolk Company* v. *Hayden*, 3 Wall. 315; but his claim was for a combination of wires with the slotted tube, containing a coiled spring and perched upon a post. In this application he makes no mention whatever of barbs as a feature of his claim, although in describing his invention he mentions the use of two wires provided at suitable intervals with spurs coiled around them, and which are spread apart between the coils to keep the latter from moving longitudinally upon the wires. But he

says of these spurs: "I do not claim to have originated the devices known as 'spurs' or 'prongs' on the wires, they having been used before, but confine myself to the means for holding the spurs at proper intervals on the wires and to the means for attaining a uniform tension of the wires, as claimed." This disclaimer, it will be observed, is of spurs or prongs generally — not of the coiled barb either alone or in combination with the twisted wires — and is made with reference to that application only. It is true that this patent was subsequently reissued with a broadly expanded claim for a combination with a fence-wire of a barb formed of a short piece of pointed wire, secured in place upon the fence wire by coiling between its ends, forming two projecting points; but this reissue was held to be unwarranted and void in *Washburn & Moen Manufacturing Company* v. *Fuchs*, 16 Fed. Rep. 661, 667. This attempted reissue, however, did not in any way affect his original application, which stood upon its own merits, and, after being rejected and amended three times, was finally passed, with a claim substantially identical with the first claim of the original application, and the patent granted. In legal effect this was a prior patent, since the date of the application and not the date of the patent controls in determining the legal effect to be given to two patents issued at different dates to the same inventor and the order in which they are to be considered. In any event, the reissue in 1876 of one patent would not affect another patent granted in 1874.

From this review of the state of the art at the time the patent in suit was issued it is evident that Glidden can neither claim broadly the use of the plain or the twisted wire, nor the sharp thorns or barbs, nor indeed the combination of the two as they appear in the Kelly patent. It does not follow, however, that he did not make a most valuable contribution to the art of wire fencing in the introduction of the coiled barb, in combination with the twisted wire, by which it is clamped and held in position. By this device the barb was prevented from turning or moving laterally and was held rigidly in place. If this be also true of the device shown in Figure 2 of the Kelly patent of February 11, 1868, the immobility of the barb in that

patent is due to the aid of a blow struck by a hammer, since the mere fact that the barbs were strung upon the wires would not of itself prevent a movement within certain limits unless they were held fast by compression. Indeed, it is obvious, as the patentee says, that the effect of the second wire is simply to increase the strength of the wire, and not, as in the Glidden patent, to hold the barb rigidly in place, though, of course, it would prevent its movement to any considerable extent in either direction. All he says of it in this connection is that "it tends to insure a regularity in the distribution of the points in many different directions." The vital difference in the two patents is in the shape of the barb itself. In one case a flat bit of metal is used of an elongated diamond shape, through which a hole is pierced, by means of which it is strung upon the wire, requiring something more than the aid of a second wire twisted upon the first to render it immovable. In the other the barb is a piece of wire coiled about one of the fence wires, and held rigidly in place by the twisting of another wire about the first.

It is true that the affixing of barbs to a fence-wire does not apparently give a wide scope to the ingenuity of the inventor; but from the crude device of Hunt to the perfected wire of Glidden, each patent has marked a step in the progress in the art. The difference between the Kelly fence and the Glidden fence is not a radical one, but slight as it may seem to be, it was apparently this which made the barbed-wire fence a practical and commercial success. The inventions of Hunt and Smith appear to be scarcely more than tentative, and never to have gone into general use. The sales of the Kelly patent never seem to have exceeded 3000 tons per annum, while plaintiff's manufacture and sales of the Glidden device (substituting a sharp barb for a blunt one) rose rapidly from 50 tons in 1874 to 44,000 tons in 1886, while those of its licensees in 1887 reached the enormous amount of 173,000 tons. Indeed, one who has travelled upon the western plains of this continent cannot have failed to notice the very large amount of territory enclosed by these fences which otherwise, owing to the great scarcity of wood, would have to be left unprotected.

Under such circumstances courts have not been reluctant to

sustain a patent to the man who has taken the final step which has turned a failure into a success. In the law of patents it is the last step that wins. It may be strange that, considering the important results obtained by Kelly in his patent, it did not occur to him to substitute a coiled wire in place of the diamond shape prong, but evidently it did not; and to the man to whom it did ought not to be denied the quality of inventor. There are many instances in the reported decisions of this court where a monopoly has been sustained in favor of the last of a series of inventors, all of whom were groping to attain a certain result, which only the last one of the number seemed able to grasp. Conspicuous among these is the case of *Loom Company* v. *Higgins*, 105 U. S. 580, 591, where an improvement in looms for weaving pile fabrics, consisting of such a new combination of known devices as to give to a loom the capacity of weaving fifty yards of carpet a day, when before it could only weave forty, was held to be patentable. It was said by the court, in answer to the argument that the combination was a mere aggregation of old and well-known devices, that "this argument would be sound if the combination claimed by Webster was an obvious one for attaining the advantages proposed — one which would occur to any mechanic skilled in the art. But it is plain from the evidence, and from the very fact that it was not sooner adopted and used, that it did not, for years, occur in this light to even the most skilful persons. It may have been under their very eyes, they may almost be said to have stumbled over it; but they certainly failed to see it, to estimate its value, and to bring it into notice. . . . Now that it has succeeded, it may seem very plain to any one that he could have done it as well. This is often the case with inventions of the greatest merit. It may be laid down as a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produce a new and beneficial result, never attained before, it is evidence of invention."

So in *Consolidated Valve Company* v. *Crosby Valve Company*, 113 U. S. 157, 179, it was said "that Richardson's invention brought to success what prior inventors had essayed and

partly accomplished. He used some things which had been used before, but he added just that which was necessary to make the whole a practically valuable and economical apparatus. The fact that the known valves were not used, and the speedy and extensive adoption of Richardson's valve, are facts in harmony with the evidence that his valve contains just what the prior valves lack, and go to support the conclusion at which we have arrived on the question of novelty."

In *Smith* v. *Goodyear Dental Vulcanite Company*, 93 U. S. 486, 495, it was said by the court: "We do not say the single fact that a device has gone into general use, and has displaced other devices which had previously been employed for analogous uses, establishes in all cases that the later device involves a patentable invention. It may, however, always be considered; and, when the other facts in the case leave the question in doubt, it is sufficient to turn the scale." See also *Magowan* v. *New York Belting Co.*, 141 U. S. 332, 343.

(2) Thus far we have considered, as bearing upon the state of the art, devices, the character, construction and scope of which were exactly defined in the specifications and drawings of actual patents, the only question presented being the proper interpretation of such patents, and the bounds they had set to the ingenuity of succeeding inventors. We have now to deal with certain unpatented devices, claimed to be complete anticipations of this patent, the existence and use of which are proven only by oral testimony. In view of the unsatisfactory character of such testimony, arising from the forgetfulness of witnesses, their liability to mistakes, their proneness to recollect things as the party calling them would have them recollect them, aside from the temptation to actual perjury, courts have not only imposed upon defendants the burden of proving such devices, but have required that the proof shall be clear, satisfactory and beyond a reasonable doubt. Witnesses whose memories are prodded by the eagerness of interested parties to elicit testimony favorable to themselves are not usually to be depended upon for accurate information. The very fact, which courts as well as the public have not failed to recognize, that almost every important patent, from the

cotton gin of Whitney to the one under consideration, has been attacked by the testimony of witnesses who imagined they had made similar discoveries long before the patentee had claimed to have invented his device, has tended to throw a certain amount of discredit upon all that class of evidence, and to demand that it be subjected to the closest scrutiny. Indeed, the frequency with which testimony is tortured, or fabricated outright, to build up the defence of a prior use of the thing patented, goes far to justify the popular impression that the inventor may be treated as the lawful prey of the infringer. The doctrine was laid down by this court in *Coffin* v. *Ogden*, 18 Wall. 120, 124, that "the burden of proof rests upon him," the defendant, "and every reasonable doubt should be resolved against him. If the thing were embryotic or inchoate; if it rested in speculation or experiment; if the process pursued for its development had failed to reach the point of consummation, it cannot avail to defeat a patent founded upon a discovery or invention which was completed, while in the other case there was only progress, however near that progress may have approximated to the end in view." This case was subsequently cited with approval in *Cantrell* v. *Wallick*, 117 U. S. 689, 696, and its principle has been repeatedly acted upon in the different circuits. *Hitchcock* v. *Tremaine*, 9 Blatchford, 550; *Parham* v. *American Button-Hole Machine Co.*, 4 Fisher, 468; *American Bell Telephone Co.* v. *Peoples' Telephone Co.*, 22 Fed. Rep. 309.

The testimony of the defendant tended to show the existence, public exhibition and use of a number of fences prior to the date of the application in this case; but what is known as the Morley fence is supported by the largest amount of evidence, and was the one the learned District Judge who heard this case in the court below held to have been an anticipation of this patent. (33 Fed. Rep. 261.)

A panel of this fence appears to have been exhibited at a county fair in Delaware County, Iowa, at Delhi, in 1858 and 1859. It appears that Morley owned lands in Delaware County; that his family lived in Pennsylvania; that for a number of years, from 1858 to 1864, he spent a portion of his

time in Iowa, living alone or boarding with his neighbors; that he was not of entirely sound mind; and that he died in an insane asylum in Pennsylvania in 1867, after a year's immurement. It also appears that after 1861 the county fairs of Delaware County were held in Manchester, so that whatever was exhibited by Morley at Delhi preceded by several years the application for the Glidden patent. The testimony of the defendants tended to show, and we are indebted to the court below for an abstract of it, that, at the time the fair was being held at Delhi in 1858 and 1859, Morley came to the house of one Dubois, a farmer living in Delaware County, having with him a piece of fence-wire, which had short pieces of wire wound around it; that Morley remained with him that night; that the next day he saw a panel of fence on the fair ground exhibited by Morley, made by stretching wires from a tree or post to another post; and that the wire so used was the same or similar to that previously shown him by Morley. One Bates, a blacksmith, swore that he aided Morley in putting up the panel of fence exhibited by him. He described the way the barbs were coiled around the fence-wire, testifying that he made the tools with which the short wires were twisted around the fence-wire, and describing the tools; and also that he afterwards made a pair of shears for Morley to be used in cutting the wire into pieces suitable for barbs. One Robinson, who acted as deputy marshal at the fair, testified that he rode a gray horse, and, having occasion to leave him, hitched him to a fence-post in the fair grounds, and on his return found his nose and breast bloody, caused by a cut on his lip, and on examination found that the wires attached to the post had swags or barbs thereon, formed by coiling a short piece of wire around the fence-wire. He also testified that in 1857 he was engaged in work on the railroad through Delaware County, near which Morley had a piece of land; that Morley was frequently where witness was working and tried to sell the land to him for a pair of mules; and that he had with him a piece of wire with swags on it, which he exhibited to witness, saying he was going to get it patented. There was other testimony to the effect that a boy, in playing

with other boys on the fair grounds, was thrown against the panel of fence and received two cuts, caused by the wires twisted upon the wire fence, which bled freely, and the scars of which were still visible upon his face. One Potter testified that he attended the fair and saw Morley there; that he exhibited a panel of fence made of wires strung between a tree and a post, with barbs made of short wires twisted around the plain wire; that Morley gave him a piece of the wire with barbs on it; that he took it home with him; that he and his wife talked about it and its effect upon stock; that he had the specimen of the wire in his summer kitchen for a year or more, and then put it in an old trunk in which he kept various relics and keepsakes; that it had remained there, and was there still; and then, on request of defendants' counsel, witness went to his home, brought the specimen of wire before the notary, and made it an exhibit in the case. It consists of a short piece of plain fence-wire with two barbs on it, made by twisting other pieces of wire transversely around the fence-wire. One Harrington also testified that he attended the fair; that he saw the panel of fence made of wire situated between a small tree and post, and there were barbs on it made of short wires twisted around the fence-wire; that his attention was attracted to it by efforts that were made to drive a bull upon it; and that he examined the wire and noticed its construction.

In all some twenty-four witnesses were sworn on behalf of the defendants to the existence of the Delhi fair fence. According to the recollection of some of the witnesses it was made of three or four strands of single wire, on which the barbs were fastened, the wires being attached at their ends to posts in the ground, or to a post and a tree; and that the top wire had barbs on it formed of short pieces of wire wrapped around it, some say once, others twice, and still others three times. The other two or three strands of single wire were without barbs. Beneath the top barbed wire was a board to attract the attention of the cattle, either secured to the posts or suspended by a wire from the top wire strand. This fence was put up on the second day of the fair and

exhibited one day, as it appears the fair continued but two days. No one seems to know what became of the panel, nor of the barbed wire upon it; it was never seen after the fair, beyond the single piece produced by the witness Potter.

Other witnesses sworn by the plaintiff, including the officers of the fair association and the editor of the local newspaper, were present at the fair, but have no recollection of anything of the kind. This, however, is purely negative testimony, and of no great value.

It further appeared that in 1866 Morley took out a patent for a triangular cattle pen, built of posts and boards supported upon wheels, so constructed that it could be moved by the animal inside of it. Some seven or eight witnesses testified that at different times when they saw this machine it had on it one or more strands of fence-wire with barbs or prickers on them, put on in the same manner as were the barbs on the Delhi fair exhibit, and the whole strung on the top of the posts above the boards.

Other witnesses testified to seeing fences upon farms owned or occupied by Morley, and in a yard near his mill, over which strands of barbed wire were stretched in the same manner as in the Delhi fence.

Upon the other hand, plaintiff met this testimony with that of a large number of witnesses who had seen these fences and also the cattle pen, and who testified that there was no barbed wire connected with them. The members of Morley's family, including his widow and sons, were also sworn and testified to the effect that he had never said anything about barbed wire or barbed wire fences, although it is but just to say that they remained in Pennsylvania and had never resided in Iowa. One of his sons testified that he visited Iowa once, in 1858, 1859, or 1860; and that he was at his father's mill for some time and saw no barbed wire about it, nor did he hear his father say anything about it. It is useless to go further into the detail of this testimony.

Even conceding that Morley did exhibit a wire fence armed with barbs at the Delhi County fair, we do not think the testimony connected with this fence makes out a case of prior

use of the device patented by Glidden, for the following reasons: First, while the fence may have been armed with barbs, there is very little, if anything, to show that it was constructed according to the design of the Glidden fence. Indeed, after the lapse of twenty-five years it would, in the nature of things, be highly improbable that any witness who saw this fence for the single day it was exhibited there would be able to describe it accurately. Second, if Morley had regarded this fence as of any value he would have applied for a patent upon it, since he did in fact obtain a patent for his travelling pen, which appears to have been a comparatively worthless contrivance. If this pen had been armed with a barbed wire it is somewhat singular that no allusion was made to it in the drawings or specification. Third, the testimony of Potter, that he preserved a piece of wire given to him by Morley in a trunk containing some old relics for over twenty-five years, is not only contradicted by his son, who was familiar with the trunk, had examined its contents, and testified that he had never seen the wire there, but is improbable upon its face. Fourth, if any experiments were made by Morley in this direction they were evidently looked upon by him and by the public as of no practical value, and were subsequently abandoned and the fences lost.

While we think the testimony goes far to establish the fact that Morley exhibited a wire fence at this fair, and perhaps also used it upon his farm at about the date claimed, we are far from being satisfied that it was the Glidden device, or so near an approximation to it as to justify us in holding that it was an anticipation.

Defendants also introduced testimony tending to show that one Long, a farmer of Delaware County, Iowa, made some barbed wire fence in the spring and summer of 1873. He put the barbs upon smooth wire; made them out of staples, with two irons having holes in the ends of each, running down into the irons from the ends longitudinally, of a little larger size than the staples to be used, and of the depth of the prongs of the staples. Two pieces of this barbed wire are produced as exhibits. It was not denied by the plaintiff that Long built

a fence as claimed by him, and barbed his wire as described, but his evidence tended strongly to show that this occurred more than a year after the date fixed by him, *i.e.* in 1874 or 1875, and after application had been made for the Glidden patent.

The most cogent evidence is that of the parties of whom Long appears to have purchased the lumber to build this fence, who swore that it was shipped in January, 1875, a statement which was verified by the book-keeper in the employ of the Illinois Central Railroad, who showed the first shipment of lumber to Long to have been in January, 1875.

The existence of barbs upon what is known as the Chester D. Stone fence in 1872 is sworn to by a large number of witnesses, and denied by an equal number who were acquainted with the facts, and testified that it was an ordinary wire fence. Stone said it was made by using fence staples for barbs, putting them on by putting a staple astride of the wire, and hammering them on an iron wedge until the points passed one another, then placing the edge of the wedge between the points and driving on the head of the staple until the points of the staple were spread. The points stood out from the wire at right angles. Of all the testimony bearing upon this fence, and of the others, with a single exception, it is sufficient to observe that it is limited to a staple twisted around a single wire to form a barb, and that it totally fails to indicate the combination of the twisted wires and coiled barb of the Glidden patent. The testimony with reference to the existence of this fence was subjected to a careful examination by Mr. Justice Brewer in the case against the *Grinnell Wire Company*, 24 Fed. Rep. 23, 29, who reached the conclusion that it was unworthy of belief. Upon the perusal of this testimony we are satisfied that his conclusion was correct.

The testimony with reference to the Hutchinson fence tends to show the existence of a barbed wire fence on a farm near Manchester as early as 1868 or 1869. The depositions of four members of the same family were taken, one of whom did the work in putting the barbs upon the fence. He swears "it was a fence with posts and wires strung along on them,

like the old plain wire fence used to be. The barbs were a piece of wire, as I remember them now, like a staple, sharp at each end. We put them on with a pair of pincers, larger and heavier but similar to those used in ringing hogs." The staples, it seems, were purchased in Manchester, and the witness found it impossible to set them hard enough upon the smooth wire to prevent their turning. A piece of this barbed wire was an exhibit in the case, and shows a single wire with a pointed barb, also of wire, wound once around it. Indeed, all the testimony indicates that the barbs were placed upon a single wire, and that no attempt was made to hold them in place by twisting a second wire about it. The conclusive answer to this testimony, however, is that both the barbs and pincers were purchased of one Butler, a merchant of Manchester, and it is proven by him and his clerks that he had none of this size for sale until 1877, and that none could be bought at any hardware store in Manchester.

Some six witnesses were called by the defendant to establish the existence of a barbed wire on a fence between 1857 and 1860 upon the farm of one Beers, near De Kalb, in Illinois. The testimony showed it to be a single wire with barbs on it, forming part of a fence around a hay stack. The barb was first twisted around, and then extended along the wire possibly one-half inch to an inch, and then twisted again in the same way. Another wire forming part of a fence upon the same farm seems to have been composed of two wires, the barb being fastened to one of them. Another witness describes the fence as "two wires twisted around, and there was another piece of wire, I should judge about six inches in length, twisted around this wire, and one end projected one way and the other end the other." It appears that the prior use of this wire was set up in a case by these same plaintiffs against one Haish in the Circuit Court for the Northern District of Illinois, 10 Bissell, 65, and was held to have been insufficiently proved. A specimen of the twisted wire produced in that suit was also put in evidence in this. It is very improbable that it could have been invented by a boy in his early teens, such as Beers then was, and it is shown that he subse-

quently took out a license under the Glidden patent after being defeated in a suit brought against Haish for the infringement of this patent, in which his device was set up as an anticipation. The testimony also indicates that the exhibit is constructed of a variety of steel which did not come into use until after 1870. Upon the whole, the evidence fails to satisfy us that this fence was constructed before application was made for the Glidden patent.

There was a vast amount of testimony of similar character tending to show the use of coiled barbs upon fence-wires, which it would serve no good purpose to discuss in detail. There was evidently prior to Glidden's application more or less experimenting in a rude way in and about Delaware County, upon the subject of barbed wires as applied to wire fences, and we think it is quite probable that coiled barbs were affixed to single wires before the Glidden application was made. We are not satisfied, however, that he was not the originator of the combination claimed by him of the coiled barb, locked and held in place by the intertwisted wire. It is possible that we are mistaken in this; that some one of these experimenters may have, in a crude way, hit upon the exact device patented by Glidden, although we are not satisfied from this testimony, whether or by whom it was done. It is quite evident, too, that all or nearly all of these experiments were subsequently abandoned. But it was Glidden, beyond question, who first published this device; put it upon record; made use of it for a practical purpose; and gave it to the public, by which it was eagerly seized upon, and spread until there is scarcely a cattle-raising district in the world in which it is not extensively employed. Under these circumstances, we think the doubts we entertain concerning the actual inventor of this device should be resolved in favor of the patentee.

The decree of the Circuit Court will, therefore, be

Reversed, and the case remanded with instructions to enter a decree for the plaintiff for an accounting, and for further proceedings in conformity with this opinion.

Mr. Justice Field dissented, upon the ground that there was no novelty in the invention.

Syllabus.

No. 129. THE WASHBURN AND MOEN MANUFACTURING COMPANY v. NORWOOD. No. 130. THE WASHBURN AND MOEN MANUFACTURING COMPANY v. WILER. MR. JUSTICE BROWN delivered the opinion of the court. These cases were consolidated in the court below with that of *Washburn and Moen Manufacturing Company* v. *Beat 'Em All Barbed Wire Company*, No. 128, with a stipulation that the same decree upon the question of the validity and infringement of the patent declared upon should be entered in all the causes. They differ only in the fact that in the first case the suit was against the manufacturers, and in these cases against the vendors of the infringing wire. As the cases are identical in every other particular the same disposition will be made of them, and the decrees of the court below reversed, and the cases remanded with instructions to enter in each a decree for the plaintiff, for an accounting, and for further proceedings in conformity with the opinion in No. 128.

Mr. John R. Bennett for appellants.

M. A. H. Blair and *Mr. William H. Singleton* for appellees.

MICHIGAN INSURANCE BANK v. ELDRED.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

No. 1288. Argued January 29, 1892. — Decided February 29, 1892.

After the term at which a trial took place has expired, without the court's control over the case being reserved by standing rule or special order, and especially after a writ of error has been entered in this court, the court below cannot allow a bill of exceptions then first presented, or amend a bill of exceptions already allowed and filed.

Under the Code of Wisconsin, an express denial, upon information and belief, that the plaintiff was, at or since the commencement of the action, or is now, a corporation, puts in issue the existence of the corporation.

The conversion of a state bank into a national bank, with a change of name, under the National Banking Act, does not affect its identity, or its right to sue upon liabilities incurred to it by its former name.

Statement of the Case.

If the whole evidence introduced by the defendant upon one issue is incompetent to support it, and is admitted and considered against the plaintiff's exception, and the judge, by ruling that this evidence is decisive against the the plaintiff's right to recover, without regard to another issue in the case, induces the plaintiff not to put in evidence on the other issue, the plaintiff is entitled to a new trial, although he has not also excepted to a direction to return a verdict for the defendant.

THIS was an action by the Michigan Insurance Bank, a corporation created and organized under the laws of the State of Michigan, against a citizen of Wisconsin, upon a judgment recovered by the plaintiff against him on May 13, 1862, in an inferior court of Michigan for the sum of $4211.56. In the present action, the writ was dated May 11, 1872, and appeared by the marshal's return thereon to have been served on June 3, 1882. The defendant originally pleaded the statute of limitations of ten years, and on that issue obtained a verdict, the judgment on which was reversed by this court at October term, 1888, because evidence, introduced by the plaintiff, that within the ten years the summons had been delivered to the marshal for service, had not been properly submitted to the jury. 130 U. S. 693.

The defendant thereupon obtained leave from the Circuit Court to amend his answer, by adding, as a distinct defence, the following: "Said defendant denies, upon information and belief, that at the time of the commencement of this action the said plaintiff was, or is now, a corporation created or organized under the laws of the State of Michigan, or under the laws of any other State, Territory or government: and said defendant futher specifically denies, upon information and belief, that said plaintiff at the time of the commencement of this action was, or at any time since then has been, or is now, a corporation."

On June 24, 1891, the case came on again for trial before the Circuit Judge, when the plaintiff put in evidence its articles of incorporation under the laws of Michigan, and the record of the judgment sued on; and rested its case.

To support the defence of the statute of limitations, the defendant put in evidence the writ and the officer's return.

Statement of the Case.

In support of the other defence, the defendant offered in evidence duly certified copies of the following documents, all in accordance with the National Banking Act of June 3, 1864, c. 106: 1st. Articles of association, dated June 26, 1865, executed by the plaintiff's directors, by authority of two thirds of its stockholders, changing and converting it into a national bank, by the name of the National Insurance Bank of Detroit. 2d. The organization certificate, of the same date, executed by the plaintiff's directors, under the same authority. 3d. Instruments signed by such stockholders, conferring such authority. 4th. A certificate, dated July 13, 1865, of the Comptroller of the Currency, that the association had complied with the provisions of law, and was authorized to commence business. 5th. A certificate of liquidation, made by the cashier of the association to the Comptroller of the Currency, dated March 1, 1869.

The plaintiff objected to the admission of these documents, "because, if received in evidence, they do not show that the plaintiff does not exist as a corporation; they simply show the organization of a corporation called the National Insurance Bank of Detroit:" and also "because the incorporation of the plaintiff is not affirmatively and specifically denied in the answer, but denied on information and belief." The objections were overruled, and the documents admitted in evidence, and the plaintiff excepted to the ruling.

The defendant then rested; and the plaintiff moved that all of the defendant's evidence be stricken out, for the reason, if it be assumed to be correct, it has not made out any case." The judge said: "I think on the record as it now stands — on the proof as it now stands — the Michigan Insurance Bank became defunct and ceased to exist in 1865, when the national bank was organized;" and refused to grant the motion; and the plaintiff excepted to the refusal.

The subsequent part of the bill of exceptions contained no further exception of the plaintiff, but consisted (except the formal conclusion) of a stenographer's notes of a desultory conversation between the presiding judge and the plaintiff's counsel, upon the question whether the plaintiff should intro-

duce evidence, which he said he had, to show that the statute of limitations had not run; and ending as follows:

The judge said, "Even if the right of action was not barred, you cannot recover." The plaintiff's counsel repeated that the defendant had offered in evidence the writ and the officer's return to prove that the action was barred by the statute of limitations; and that the plaintiff had evidence that the summons was placed in the marshal's hands for service within ten years after the cause of action accrued, but there would be no use in putting in that evidence, if, regardless of it, the court would charge the jury to bring in a verdict for the defendant. Thereupon the judge said, "I think I will," and instructed the jury to return a verdict for the defendant, and they did so.

The bill of exceptions was signed by the judge on June 24, and filed on June 25, 1891, before the adjournment of January term, 1891. This writ of error was sued out on June 25, and was entered in this court on July 22, 1891.

At the present term of this court, the case was advanced for hearing, on motion of the defendant in error, under Rule 26, clause 4, because it had been once adjudged by this court on the merits.

On January 26, 1892, the plaintiff in error moved for a writ of certiorari to bring up the record of the following proceedings at January term, 1892, of the Circuit Court.

On January 16, the Circuit Judge, on the application of the plaintiff's attorneys, and upon its appearing to his satisfaction, "from the stenographer's report of the testimony and trial, that the plaintiff omitted, in the bill of exceptions heretofore signed," two exceptions which were taken at the trial, ordered, against the objection and exception of the defendant, that the original bill of exceptions be amended by inserting after the judge's words, "I think I will," the words, "to which ruling the plaintiff duly excepted;" and, after the instruction to return a verdict for the defendant, the words, "to which the plaintiff duly excepted." On January 18, after the bill of exceptions had been amended accordingly, the judge signed it *nunc pro tunc* as of June 24, 1891, and ordered it to be filed

Argument for Defendant in Error.

nunc pro tunc as of June 25, 1891, being the days when the original bill of exceptions was signed and filed.

By direction of this court, the question whether the writ of certiorari prayed for should issue was argued with the merits of the case.

Mr. George P. Miller for plaintiff in error.

Mr. Alfred L. Cary and *Mr. F. C. Winkler* for defendant in error.

I. Under the Wisconsin statute the service of the process was the *prima facie* time of the commencement of the action. Sec. 27, c. 138, Rev. Stat. of 1858. The other time recognized is delivery to the officer "with the intent that it shall be actually served." *Ibid.* One of these two things must be shown to have been done in this action within ten years after the rendition of the judgment sued on. The plaintiff's proofs show a judgment rendered in Michigan May 13, 1862. Had they shown service within the ten years it would have made the plaintiff's *prima facie* case. But it showed service only on the 3d day of June, 1872, just three weeks after the ten years expired. It was incumbent therefore on the plaintiff to prove the delivery to the marshal with the proper intent within the ten years. He rested without attempting it. On the evidence before the court he had no claim to a recovery against the defendant.

II. The logical effect of the decisions and of the act of Congress (Rev. Stat. § 5154) would seem to be that upon the conversion of a state bank into a national bank, all of its property, rights, privileges and franchises, including its corporate existence, would pass to and be merged in the national bank. What necessity for and how could the state bank exist after it had been stripped of all its property, rights and franchises? If it could still exist as a state corporation for any purpose, it would still be under the control of the state, which is obnoxious and repugnant to the authority exercised by Congress over national banks. The act of Congress certainly does not

contemplate the existence of two banks after the conversion. Hence the state bank must cease to exist for all purposes. *National Bank* v. *Colby*, 21 Wall. 609; *Casey* v. *Gallie*, 94 U. S. 673, 678; *Farmers' & Mechanics' Nat. Bank* v. *Dearing*, 91 U. S. 29, 33.

Plaintiff's conversion into a national bank was completed July 13, 1865, nearly seven years before this action was commenced, and if we are right, plaintiff ceased to exist as a corporation at that time.

Mr. Justice Gray, after stating the facts as above, delivered the opinion of the court.

By the uniform course of decision, no exceptions to rulings at a trial can be considered by this court, unless they were taken at the trial, and were also embodied in a formal bill of exceptions presented to the judge at the same term, or within a further time allowed by order entered at that term, or by standing rule of court, or by consent of parties; and, save under very extraordinary circumstances, they must be allowed by the judge and filed with the clerk during the same term. After the term has expired, without the court's control over the case being reserved by standing rule or special order, and especially after a writ of error has been entered in this court, all authority of the court below to allow a bill of exceptions then first presented, or to alter or amend a bill of exceptions already allowed and filed, is at an end. *United States* v. *Breitling*, 20 How. 252; *Müller* v. *Ehlers*, 91 U. S. 249; *Jones* v. *Grover & Baker Co.*, 131 U. S. appx. 150; *Hunnicutt* v. *Peyton*, 102 U. S. 333; *Davis* v. *Patrick*, 122 U. S. 138; *Chateaugay Co., Petitioner*, 128 U. S. 544.

The duty of seasonably drawing up and tendering a bill of exceptions, stating distinctly the rulings complained of and the exceptions taken to them, belongs to the excepting party, and not to the court; the trial court has only to consider whether the bill tendered by the party is in due time, in legal form, and conformable to the truth; and the duty of the court of error is limited to determining the validity of exceptions duly ten-

dered and allowed. *Hanna* v. *Maas*, 122 U. S. 24. Any fault or omission in framing or tendering a bill of exceptions, being the act of the party and not of the court, cannot be amended at a subsequent term, as a misprision of the clerk in recording inaccurately or omitting to record an order of the court might be. *In re Wight*, 134 U. S. 136.

The writ of certiorari prayed for must therefore be denied, and the case must be determined upon the original bill of exceptions.

By that bill of exceptions it appears that before the last trial the defendant, by leave of court, amended its answer by adding, as a distinct defence, that "said defendant denies, upon information and belief, that at the time of the commencement of this action the said plaintiff was, or is now, a corporation created or organized under the laws of the State of Michigan, or under the laws of any other State, Territory or government; and said defendant further specifically denies, upon information and belief, that said plaintiff, at the time of the commencement of this action was, or at any time since then has been, or is now, a corporation."

Section 4199 of the Code of Wisconsin provides that "in actions by or against any corporation it shall not be necessary to prove on the trial the existence of such corporation, unless the defendant, by his answer duly verified, shall have specifically denied that the plaintiff or defendant, as the case may be, is a corporation."

The scope of this section is shown by comparing it with the general provisions of section 2655 of the same code, that the answer of the defendant must contain "a general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief." A denial of the fact that the plaintiff is a corporation must be specific and not general, and a denial of any knowledge or information thereof sufficient to form a belief is not enough. *Crane Co.* v. *Morse*, 49 Wisconsin, 368; *Concordia Savings Association* v. *Read*, 93 N. Y. 474. But an express denial that the plaintiff is a corporation is not the less specific, because made upon informa-

tion and belief; and such a denial puts in issue the existence of the corporation. The plaintiff's objection to the form of the answer cannot be sustained.

The defence in question is in terms and effect a denial that the plaintiff at or since the time of the commencement of this action was or is now a corporation. This was not merely *misnomer*, properly pleadable in abatement only; it was, in substance, *nul tiel corporation*, which is a good plea in bar, although it would have been waived by the first answer to the merits of the case, but for the leave, expressly granted by the court, to plead it afterwards. *Baltimore & Potomac Railroad* v. *Fifth Baptist Church*, 137 U. S. 568, 572; *Society for Propagating the Gospel* v. *Pawlet*, 4 Pet. 480, 501; *Jones* v. *Foster*, 67 Wisconsin, 296.

The evidence offered by the defendant on this point wholly failed to support this defence, and at most only proved that the plaintiff sued by the wrong name. It showed no more than that the plaintiff corporation, having been originally created by the laws of Michigan, had, in accordance with the National Banking Act, become a national bank, and its name been changed accordingly, without affecting its identity, or its right to sue upon obligations or liabilities incurred to it by its former name. Act of June 3, 1864, c. 106, § 44; 13 Stat. 112; Rev. Stat. § 5154; *Metropolitan Bank* v. *Claggett*, 141 U. S. 520; *Atlantic Bank* v. *Harris*, 118 Mass. 147; *City Bank* v. *Phelps*, 86 N. Y. 484, and 97 N. Y. 44.

The admission of this evidence was objected to by the plaintiff, upon the very ground that it did not prove the non-existence of the plaintiff as a corporation; and an exception to its admission was duly taken and noted, and embodied in the bill of exceptions.

The plaintiff afterwards renewed the objection, by moving "that all of the defendant's evidence be stricken out, for the reason, if it be assumed to be correct, it has not made out any case." The reason assigned by the judge for refusing to grant this motion was his erroneous opinion that on the proof as it stood "the Michigan Insurance Bank became defunct and ceased to exist in 1865, when the national bank

was organized;" and the plaintiff again excepted in due form.

Although the subsequent proceedings had at the trial, and stated in the original bill of exceptions, do not appear on this record to have been excepted to, yet those proceedings may properly be considered for the purpose of showing, as they do beyond doubt, that the judge's rulings in favor of the defendant proceeded solely upon the incompetent evidence to the admission and consideration of which the plaintiff had persistently excepted; and that it was only by the judge's statements that that evidence was decisive against the plaintiff's right to recover, even if the action was not barred, and that he should instruct the jury accordingly, that the plaintiff was induced not to put in any testimony upon the issue of the statute of limitations. If the plaintiff had put in its testimony on that issue, the case would have stood just as it did when before this court at a former stage; and, as was then adjudged, a direction to return a verdict, without submitting that issue to the jury, would have been erroneous, and would have entitled the plaintiff to a new trial. 130 U. S. 693.

The admission of the incompetent evidence on the issue of *nul tiel corporation* having thus clearly prejudiced the plaintiff, the order must be

Judgment reversed, and case remanded, with directions to set aside the verdict and to order a new trial.

MR. JUSTICE BREWER dissented.

LUDELING v. CHAFFE.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 178. Argued and submitted January 8, 1892. — Decided February 29, 1892.

The highest court of a State decided that a judgment of another court of the State, granting a petition to revive a judgment under a statute of limitations of the State authorizing this to be done upon citation "to

the defendant or his representative," in order to prevent the running of the statute, could not, at the suit of one claiming under the original defendant, be collaterally impeached because the only person cited was the assignee in bankruptcy of that defendant. *Held*, that the decision was not subject to review by this court on writ of error.

THE case is stated in the opinion.

Mr. S. H. Hubbard and *Mr. Solicitor General* for plaintiff in error.

Mr. Charles J. Boatner, for defendants in error, submitted on his brief.

MR. JUSTICE GRAY delivered the opinion of the court.

This was a petition, filed May 8, 1884, in the fifth District Court of the parish of Ouachita in the State of Louisiana, to restrain the execution against land in that parish of a judgment rendered June 28, 1882, in favor of the defendants, by which that land (to which the petitioner claimed title under a conveyance from Mrs. Eliza W. Warfield, dated June 30, 1875) was subjected to a judicial mortgage arising out of a judgment for money, recovered by the defendants March 20, 1874, in a personal action against Mrs. Warfield. The petitioner alleged that the original judgment against Mrs. Warfield had been prescribed by virtue of article 3547 of the Civil Code of Louisiana, (which is copied in the margin,[1]) and that a judgment

[1] "All judgments for money, whether rendered within or without the State, shall be prescribed by the lapse of ten years from the rendition of such judgments: Provided, however, that any party interested in any judgment may have the same revived, at any time before it is prescribed, by having a citation issued according to law to the defendant or his representative from the court which rendered the judgment, unless defendant or his representative show good cause why the judgment should not be revived; and if such defendant be absent and not represented, the court may appoint a *curator ad hoc* to represent him in the proceedings, upon which *curator ad hoc* the citation shall be served. Any judgment revived as above provided shall continue in full force for ten years from the date of the order of court reviving the same, and any judgment may be revived as often as the party or parties interested may desire."

since recovered by the defendants, reviving that judgment, was null and void, for want of sufficient notice. The material facts bearing on the validity of the judgment of revival were as follows:

On September 11, 1876, Mrs. Warfield was adjudged a bankrupt under the laws of the United States, and William T. Atkins was appointed her assignee in bankruptcy, and as such sold the property in her schedule, and rendered his final account on October 15, 1879, but was never discharged from his duties as assignee. Mrs. Warfield never obtained her discharge in bankruptcy, and permanently removed in 1879 from the State of Louisiana, and died in Tennessee in 1881, leaving no heirs in Louisiana.

On February 8, 1884, the parish district court, upon the application of the defendants, appointed its clerk administrator of Mrs. Warfield's estate, and he took an oath assuming the administration. On February 9, 1884, the defendants filed a petition in that court under said article of the Civil Code, praying for a revival of the original judgment against Mrs. Warfield, for the appointment of a curator *ad hoc*, and for a citation to such curator, to the administrator, and to Atkins, assignee. A curator *ad hoc* was accordingly appointed, and he and the administrator waived citation and appeared and answered. Atkins was served with a citation, and also appeared and answered, denying all the allegations of the petition. Judgment was thereupon rendered, on February 20, 1884, reviving the original judgment, and in March. 1884, was duly recorded and reinscribed.

In the case at bar, the court refused the injunction prayed for, and gave judgment for the defendants, and this judgment was affirmed by the Supreme Court of Louisiana.

The petitioner sued out this writ of error, which was allowed by Chief Justice Bermudez, who added this memorandum: "In this case the court has passed upon no question, except the method of interrupting prescription on a judgment provided by the statute of the State, a matter within the arbitrary control of the State legislature, and involving no question of due process of law. Even as to this question, we have

simply held that the judgment of revival could not be questioned in the present form of action. I do not consider that any Federal question properly arises and was passed upon in the case; but as one was presented which, it is claimed, might be considered to exist by the United States Supreme Court, I grant the order."

The grounds upon which the jurisdiction of this court is invoked by the petitioner are that the state court, by holding that the citation to Atkins as assignee was valid and effectual to support the judgment of revival, deprived the petitioner of his property without due process of law, in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States; and construed the Bankrupt Act of the United States, and article 3547 of the Civil Code of Louisiana, so as to make them unconstitutional by thus depriving him of his property; and disregarded section 5057 of the Revised Statutes of the United States, which provides that "no suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee," and thereby denied a right and immunity claimed by the petitioner under the Bankrupt Act of the United States.

But the judgment of the Supreme Court of Louisiana, as appears by its opinion, copied in the record, and reported in 40 La. Ann. 645, as well as by the Chief Justice's memorandum, above quoted, did not pass upon the question of the capacity of the assignee to represent the bankrupt in the proceedings to obtain the judgment of revival; and merely held that this question could not be presented and decided in this collateral way, but only in a direct suit to annul that judgment, bringing in all parties to it.

The question presented to the inferior court of the State upon the petition for the judgment of revival was whether the assignee in bankruptcy was such a representative of the original judgment debtor that a citation might issue to the assignee

under the statute of limitations of Louisiana, for the purpose of preventing a judgment, admitted to be valid, from being prescribed within ten years from the time of its rendition. The true construction of the statute of limitations in this respect, as well as the proper manner of reviewing the decision of that question, if erroneous, was a matter of state law and practice, in no way depending upon the Constitution of the United States or upon any act of Congress.

In order to give this court jurisdiction of a writ of error to review a judgment of a state court against a right claimed under a statute of the United States, that right must be one of the plaintiff in error, and not of a third person only. *Giles* v. *Little*, 134 U. S. 645. The immunity or privilege of the assignee in bankruptcy from being cited in these proceedings could only be set up by the assignee himself, or by a person claiming under him, and not by a person claiming under a conveyance from the bankrupt before the bankruptcy. The assignee, having appeared and answered to the petition for revival, and thereby submitted himself to the jurisdiction of the state court, would have been bound by its judgment, if against him. *Winchester* v. *Heiskell*, 119 U. S. 450; *Adams* v. *Crittenden*, 133 U. S. 296. But he set up no title in himself, no judgment was rendered against him, and he has sued out no writ of error. Section 5057 of the Revised Statutes has therefore no application to the case.

Writ of error dismissed for want of jurisdiction.

HORN SILVER MINING COMPANY v. NEW YORK STATE.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 48. Argued and submitted December 11, 1891. — Decided February 29, 1892.

The statute of New York of May 26, 1881, (Laws of 1881, c. 361,) imposing a tax upon the corporate franchise or business of every corporation, joint-stock company or association incorporated or organized under any

law of the State or of any other State or country, to be computed by a percentage upon its whole capital stock, and to be ascertained in the manner provided by the act, when applied to a manufacturing corporation organized under the laws of Utah, and doing the greater part of its business out of the State of New York, and paying taxes in Illinois and Utah, but doing a small part of its business in the State of New York, does not tax persons or property not within the State; nor regulate interstate commerce; nor take private property without just compensation; nor deny to the corporation the equal protection of the laws; nor impose a tax beyond the constitutional power of the State: and the remedy of the corporation against hardship and injustice, if any has been suffered, must be sought in the legislature of the State.

The cases respecting state taxation of foreign corporations reviewed.

THE court stated the case as follows:

The defendant below, the plaintiff in error here, the Horn Silver Mining Company, is a corporation created under the laws of the Territory of Utah. The present action is brought by the People of the State of New York, upon the allegation that it was doing business within the State in 1881 and 1882, to recover certain taxes alleged to be chargeable on its "corporate franchise or business" for those years and the penalty prescribed for their non-payment in each year.

By the act of the legislature of New York, approved May 26, 1881, (1 Sess. Laws, 1881, p. 481, c. 361,) amending a previous act providing for levying taxes for the use of the State upon certain corporations, joint-stock companies and associations, it was declared that every corporation, joint-stock company, or association then or thereafter incorporated or organized under any law of the State, or of any other State or country, and doing business in the State, with certain specified exceptions not important in this case, should be subject to a tax "upon its corporate franchise or business," to be computed in a mode specified, which was by a certain percentage upon its capital stock measured by the dividend on the par value of that stock, or, where there were no dividends, or its dividends were less than a certain percentage upon the par value of the capital stock, then according to a certain percentage upon the actual value of the capital stock, during the year.

Statement of the Case.

The complaint in the action alleges the facts necessary to charge the corporation under this act for both years; that the amount of tax due pursuant to its provisions for the year ending on the first day of November, 1881, was $7500, and the additional sum of $1500 as a penalty for the delay of the company in paying the tax for two years after it became due, and that the amount of taxes due for the year ending on the first day of November, 1882, was $30,000, with the further sum of $3000 as a penalty of ten per centum for the delay of the defendant in paying the same.

The defendant answered the various allegations of the complaint, denying them so far as they charge liability to the people of New York, and setting up that it had been at all times a manufacturing corporation organized and existing under the laws of Utah; that it had never exercised any franchises or powers under the laws of New York; that its capital stock of ten millions of dollars was issued in payment for real estate in Utah and Illinois, which consists entirely of mining property and improvements thereon, and a refinery; that during the years ending November 1, 1881 and 1882, it carried on in the State of New York the business of manufacturing bars of silver from Utah and Illinois into standard bars; that said business constituted but a small portion of its entire business, and was the only business carried on in the State of New York, except its financial business and correspondence; that its capital stock was only partially employed in New York; and that it paid taxes both in Utah and in Illinois. It insisted that the statute, upon which the action was brought, was invalid and inoperative as to it because of the facts set forth, and because it established an unjust and unequal system of taxation, and fixed the amount of tax wholly without regard to the extent of the corporate franchises exercised by it in the State, and without regard to the amount of business done within the State, or the amount of capital employed or the amount of its capital stock held in the State, and the extent of the protection and benefits derived from its laws and agencies, and because it sought to tax property and persons not within the jurisdiction of the State or in

any way subject to its authority, and violated the principles of equality and uniformity. It also insisted that the taxation attempted was, in effect, the taking of private property without just compensation, the denial to defendant of the equal protection of the laws, and a regulation of commerce among the several States, and taxing property and business without the jurisdiction of the State of New York. By consent of parties the case was referred to a referee to hear and determine all the issues of law and fact therein. The referee found that the defendant was a corporation created and organized under the laws of the Territory of Utah, and was at all times mentioned in the complaint, doing business in the State of New York, and liable to be taxed on its corporate business under the provisions of section 3 of the act of New York above cited. He also found, in substance, that the stock and capital of the defendant were properly appraised and the amount of the tax was assessed in conformity with the provisions of that act, and that, accordingly, the sums above mentioned, amounting to $41,250, were due; and he directed a judgment to be entered therefor in favor of the plaintiff.

The referee also found that the defendant paid taxes, both in the Territory of Utah and in the State of Illinois in the years 1881 and 1882, and that the greater part of its business was out of the State of New York as well as the greater part of the capital used in its business.

Upon the findings of the referee judgment was entered in the Supreme Court of the State for the amount reported, and the case, being taken to the Court of Appeals, was there affirmed. Being then remitted to the Supreme Court and entered there, the case was brought, on a writ of error, to this court.

Mr. Julien T. Davies (with whom was *Mr. Edward Lyman Short* on the brief) for plaintiff in error.

I. The taxes in question are not license taxes imposed upon a foreign corporation as a prerequisite of doing business in the State of New York. The New York statutes impose a tax for revenue. Their purpose is to do this, and they are enacted

under the taxing power. They are not license laws, enacted under the police power of the State. These taxes are not the price of a permit to do business within the State, the payment of which is a condition precedent to the transaction of such business. They are to be judged therefore as tax laws. The title of the acts of 1880 and 1881 is,

"An Act *to provide for raising taxes* for the use of the State upon certain corporations," etc. The Constitution of the State of New York makes the title of an act in some cases of controlling importance, and it is held to be a "legitimate" subject for consideration in "determining the intent of special legislative action." *Westchester Fire Ins. Co.* v. *Davenport*, 91 N. Y. 514, 585.

The language of Mr. Justice Blatchford in *Philadelphia Fire Association* v. *New York*, 119 U. S. 110, 119, shows distinctly the difference between a license fee which is a prerequisite to doing business for the future and a tax. "This Pennsylvania corporation came into the State of New York to do business by the consent of the State, under this act of 1853, with a license granted for a year, and has received such license annually, to run for a year. It is within the State for any given year under such license, and subject to the conditions prescribed by statute. The State, having the power to exclude entirely, has the power to change the conditions of admission at any time for the future, and to impose as a condition the payment of a new tax, or a further tax, as a license fee. If it imposes such license fee as a prerequisite for the future, the foreign corporation, until it pays such license fee, is not admitted within the State or within its jurisdiction. It is outside, at the threshold, seeking admission, with consent not yet given."

This law, therefore, can obtain no support from any assumed principle or rule of law that any burden may be imposed upon a foreign corporation as a condition of doing business in any State.

The legislature could not, because of its power to impose a burden upon foreign corporations as a condition of doing business, take money or property from a foreign corporation,

already lawfully doing business there, by an absolute and unconditional demand. It will hardly be disputed that a corporation created by one State may do business in another by virtue of interstate comity, unless prohibited by the law or established policy of the latter. *Cowell* v. *Springs Co.*, 100 U. S. 55; *Christian Union* v. *Yount*, 101 U. S. 352.

II. The taxes in question, in the view of the court of appeals of the State of New York, were laid upon the business of the Horn Silver Mining Company transacted in the State of New York. That business consisted: (1) In selling to the United States, at its Assay Office in the city of New York, the silver bullion bars refined in Chicago from base bullion sent there from Utah, where the ore is mined and smelted into base bullion. (2) In transmitting a large part of the proceeds of the sales in New York to Utah. (3) In retaining the remainder of the proceeds of sales in the city of New York, loaning them and keeping them in bank until required for the payment of dividends, and then paying dividends in New York therefrom. (4) In maintaining an office for officers and directors.

The taxes in question, then, if the construction of the Court of Appeals be accepted, fall upon the business of the Horn Silver Mining Company done in the State of New York during the years 1881 and 1882, measured by its entire capital stock taken at a valuation in the case of the tax for the year 1881, and measured by the rate of annual dividends multiplied upon the entire capital stock in the case of the tax for the year 1882. As that business is principally and primarily the business of importing silver bullion into the State of New York and there selling it, all other business being merely incidental thereto, the taxes in question fall upon transactions of that character.

III. The business of bringing bars of silver from Chicago to New York and there selling them is interstate commerce. Inasmuch as interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities, is national in its character, and must be governed by a uniform system, Congress, so long as it does not pass any law to regulate it or

allowing the States so to do, thereby indicates its will that such commerce shall be free and untrammelled." *Leisy* v. *Hardin*, 135 U. S. 100; *Mobile* v. *Kimball*, 102 U. S. 691; *Ball* v. *United States*, 10 Wall. 557; *Brown* v. *Maryland*, 12 Wheat. 419.

IV. The statutes in question regulate interstate commerce in so far as they tax plaintiff in error for its business done in the State of New York during the years 1881 and 1882, and therefore are invalid to sustain the taxes for which judgment has been recovered. *Hall* v. *De Cuir*, 95 U. S. 485; *Pembina Mining Co.* v. *Pennsylvania*, 125 U. S. 181; *Norfolk & Western Railroad* v. *Pennsylvania*, 136 U. S. 114; *Cooper Manufacturing Co.* v. *Ferguson*, 113 U. S. 727; *Moran* v. *New Orleans*, 112 U. S. 69; *Brown* v. *Maryland*, 12 Wheat. 419; *Philadelphia & Southern Steamship Co.* v. *Pennsylvania*, 122 U. S. 326; *Corson* v. *Maryland*, 120 U. S. 502; *Fargo* v. *Michigan*, 121 U. S. 230; *Lyng* v. *Michigan*, 135 U. S. 161.

V. If the taxes in question are not laid upon the business of plaintiff in error in New York they are laid upon all its business or upon all its capital, and therefore either regulate commerce among the States or effect extra territorial taxation and are invalid *pro tanto*. A tax on capital stock at its actual value is a general tax on the property of the corporation. *Bank of Commerce* v. *New York City*, 2 Black, 620; *Bank Tax Case*, 2 Wall. 200, 208.

As a valuation of the entire capital stock of plaintiff in error is the just and natural measure of either all the business of the company, or of all its property, it follows that the taxes in question fall either upon all its business or upon all its property.

The plaintiff in error is not endeavoring to escape its fair share of the burden of taxation. For ten years it has been trying to pay the State of New York its taxes upon its business transacted within that State, measured by the capital actually employed within the State, or to state the effect of the statute more accurately, upon its property situated within the State of New York. The question now presented in this case is whether New York, and, therefore, every State in the

Union, can, under guise of taxing business that has been transacted within its border, (not of imposing a license tax,) tax all the property of a foreign corporation wheresoever situated. This tax is a property tax, and nothing else, in its operation upon foreign corporations. The recent decisions of this court establish that proposition beyond question in dealing with statutes with identical provisions. *Western Union Telegraph Co.* v. *Massachusetts*, 125 U. S. 530; *Pullman's Car Co.* v. *Pennsylvania*, 141 U. S. 18; *Massachusetts* v. *Western Union Telegraph Co.*, 141 U. S. 40.

VI. The statutes in question should be confined in their effect to the property of plaintiff within the jurisdiction of the State of New York.

If these statutes be declared effective only to tax the capital of the plaintiff in error within the State of New York, they will be confined in their operation to a subject within the taxing power of this State, and restrained from operating upon subjects beyond the exercise of this power. *Telegraph Co.* v. *Texas*, 105 U. S. 460; *Western Union Telegraph Co.* v. *Massachusetts*, 125 U. S. 530; *Ratterman* v. *Western Union Telegraph Co.*, 127 U. S. 411; *Massachusetts* v. *Western Union Telegraph Co.*, 141 U. S. 40.

VII. The affirmance of the judgment against plaintiff in error would be a deprivation by the State of New York of the property of the plaintiff in error without due process of law, and a denial of the equal protection of the laws, contrary to the Fourteenth Amendment of the Constitution of the United States.

Mr. Charles F. Tabor, Attorney General of the State of New York, submitted on his brief.

Mr. Justice Field delivered the opinion of the court.

A corporation being the mere creature of the legislature, its rights, privileges and powers are dependent solely upon the terms of its charter. Its creation (except where the corporation is sole) is the investing of two or more persons with the

capacity to act as a single individual, with a common name, and the privilege of succession in its members without dissolution, and with a limited individual liability. The right and privilege, or the franchise, as it may be termed, of being a corporation, is of great value to its members, and is considered as property separate and distinct from the property which the corporation itself may acquire. According to the law of most States this franchise or privilege of being a corporation is deemed personal property, and is subject to separate taxation. The right of the States to thus tax it has been recognized by this court and the state courts in instances without number. It was said in *Delaware Railroad Tax*, 18 Wall. 206, 231, that "the State may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate corporate property. And the manner in which its value shall be assessed, and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion;" except, we may add, as that discretion is controlled by the organic law of the State. And, as we there said also, "it is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the State; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction."

The granting of the rights and privileges which constitute the franchises of a corporation being a matter resting entirely within the control of the legislature, to be exercised in its good pleasure, it may be accompanied with any such conditions as the legislature may deem most suitable to the public interests and policy. It may impose as a condition of the grant, as well as, also, of its continued exercise, the payment of a specific sum to the State each year, or a portion of the profits or gross receipts of the corporation, and may prescribe such mode in which the sum shall be ascertained as may be deemed convenient and just. There is no constitutional inhibition against the legislature adopting any mode to arrive at the sum which it will exact as a condition of the creation of the corporation or of its continued existence. There can be, therefore, no pos-

sible objection to the validity of the tax prescribed by the statute of New York, so far as it relates to its own corporations. Nor can there be any greater objection to a similar tax upon a foreign corporation doing business by its permission within the State. As to a foreign corporation — and all corporations in States other than the State of its creation are deemed to be foreign corporations — it can claim a right to do business in another State, to any extent, only subject to the conditions imposed by its laws.

As said in *Paul* v. *Virginia*, 8 Wall. 168, 181, "the recognition of its existence even by other States, and the enforcement of its contracts made therein, depend purely upon the comity of those States — a comity which is never extended where the existence of the corporation or the exercise of its powers is prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."

This doctrine has been so frequently declared by this court that it must be deemed no longer a matter of discussion, if any question can ever be considered at rest.

Only two exceptions or qualifications have been attached to it in all the numerous adjudications in which the subject has been considered, since the judgment of this court was announced more than half a century ago in *Bank of Augusta* v. *Earle*, 13 Pet. 519. One of these qualifications is that the State cannot exclude from its limits a corporation engaged in interstate or foreign commerce, established by the decision in *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1, 12. The other limitation on the power of the State is, where the corporation is in the employ of the general gov-

ernment, an obvious exception, first stated, we think, by the late Mr. Justice Bradley in *Stockton* v. *Baltimore & New York Railroad*, 32 Fed. Rep. 9, 14. As that learned justice said: "If Congress should employ a corporation of ship-builders to construct a man-of-war, they would have the right to purchase the necessary timber and iron in any State of the Union." And this court, in citing this passage, added, "without the permission and against the prohibition of the State." *Pembina Mining Co.* v. *Pennsylvania*, 125 U. S. 181, 186.

Having the absolute power of excluding the foreign corporation the State may, of course, impose such conditions upon permitting the corporation to do business within its limits as it may judge expedient; and it may make the grant or privilege dependent upon the payment of a specific license tax, or a sum proportioned to the amount of its capital. No individual member of the corporation, or the corporation itself, can call in question the validity of any exaction which the State may require for the grant of its privileges. It does not lie in any foreign corporation to complain that it is subjected to the same law with the domestic corporation. The counsel for the appellant objects that the statute of New York is to be treated as a tax law, and not as a license to the corporation for permission to do business in the State. Conceding such to be the case we do not perceive how it in any respect affects the validity of the tax. However it may be regarded, it is the condition upon which a foreign corporation can do business in the State, and in doing such business it puts itself under the law of the State, however that may be characterized.

The only question therefore open to serious consideration in this case is one of fact: Did the Horn Silver Mining Company do business as a corporation within the State? The referee found such to be the fact, as a conclusion from many probative circumstances in the case. That finding was never set aside, but stands approved by the courts of New York. If the correctness of the conclusion could be questioned, and held not justified by the facts in evidence — and they should be considered as showing only transactions of interstate commerce, and not business in the State independently of such commerce — it

would be impossible to overcome the force of the answer of the defendant in which it alleges that in the years 1881 and 1882 it was a manufacturing company carrying on manufactures within the State of New York. The admission is conclusive that the corporation was engaged in business in the State in those years, though, we are clear, not in such a business as rendered it a manufacturing corporation exempt from the tax prescribed by the statute.

To dispose of the position that the plaintiff in error was a manufacturing corporation, and therefore excepted from taxation under the statutes cited, it is only necessary to refer to the articles of association of the company. By them it appears that it was organized to conduct the business of buying, selling, leasing and operating mines and mining claims in the Territory of Utah, and smelting, reducing and refining works there and elsewhere; of conducting a general mining, milling and smelting business in all its branches, including buying and selling mineral ores and bullion; of carrying on a general mercantile business by buying and selling such goods, merchandise, stores and miners' supplies as are usually kept in and required by the wants of a mining camp or settlement; of building and operating all such roads, tramways and transportation routes as may be convenient in transporting the products of its business or procuring supplies; of purchasing, hiring and holding all such real and personal property, wherever situate, as may be required in carrying on any of its business, and, when no longer required for business purposes, of leasing, selling or exchanging the same; and generally to do all acts and things incidental to a general mining business, or to any of the aforesaid pursuits. They also declare that it was primarily formed for the immediate purpose of working and developing the estate, property and premises known as the Horn silver mine, and the treatment and reduction of the ores and metals therein contained. There is in the business thus detailed nothing that would characterize the corporation as a manufacturing company, and in no proper sense was it engaged in a manufacturing business within the State. The bullion taken by the company from its mines was shipped to

Chicago, and, after being refined and the silver separated from the lead, it was forwarded to the United States assay office in the city of New York, where it had an office, not for occasional business transactions, but where its transfer books were kept, its dividends declared and paid, and other business done by it such as is usually performed by corporations where their principal office of business is situated. It is true, the greater part of the business of the company was done out of the State, and the greater part of its capital was also without it, but the statute of New York does not require that the whole business of a foreign corporation shall be done within the State in order to subject it to the taxing power of the State. It makes, in that respect, no difference between home corporations and foreign corporations, as to the franchise or business of the corporation upon which the tax is levied, provided it does business within the State, as such corporation.

There seems to be a hardship in estimating the amount of the tax upon the corporation, for doing business within the State, according to the amount of its business or capital without the State. That is a matter, however, resting entirely in the control of the State, and not a matter of Federal law, and with which, of course, this court can in no way interfere.

Since this tax was levied the law of the State has been altered, and now the tax upon foreign corporations doing business in the State is estimated by the consideration only of the capital employed within the State. It is said that against nearly all other foreign corporations, except this one, the taxes upon their franchises have been computed upon the basis of the capital employed within the State; but as to that we can only repeat what was said in the Court of Appeals of the State, that, if this be true, the defendant may have reason to complain of unjust discrimination and may properly appeal for relief to the legislature of the State, but that it is not within the power of the court to grant any relief however great the hardship upon it.

The extent of the tax is a matter purely of state regulation, and any interference with it is beyond the jurisdiction of this court. The objection that it operates as a direct interference

with interstate commerce we do not think tenable. The tax is not levied upon articles imported, nor is there any impediment to their importation. The products of the mine can be brought into the State and sold there without taxation, and they can be exhibited there for sale in any office or building obtained for that purpose; the tax is levied only upon the franchise or business of the company.

Judgment affirmed.

MR. JUSTICE HARLAN dissented.

CHANDLER *v.* POMEROY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

No. 1343. Submitted November 17, 1891. — Decided February 29, 1892.

In order to justify a court in refusing to enforce a settlement of a quarrel between the members of a large family, growing out of disputes about the wills of their father and other members of the family, and out of money transactions between brothers and sisters, upon the ground that the settlement was obtained by misrepresentation, active or covert, or that it failed to express the real intent of the parties, the testimony should establish the fact clearly and satisfactorily; and in this case it is not so established.

THIS was a bill in equity filed September 4, 1888, by the appellant Chandler, as executor and trustee under the last will and testament of George P. Pomeroy, deceased, against Josephine Pomeroy, Julia Pomeroy Morrison, her husband, William F. Morrison, and Alfred Mills, surviving executor of the last will and testament of George Pomeroy, father of the said George P. Pomeroy, to enforce a certain agreement of settlement between George P. Pomeroy and his sisters, devisees of the estate of George Pomeroy. The bill was subsequently dismissed as to the defendant William F. Morrison, and about

the same time Eugene C. Pomeroy, son and heir at law of George P. Pomeroy, appeared by his guardian and asked to be made party complainant, if the court should deem it necessary or desirable, but no order appears to have been entered making him a party.

The case arose out of the following facts: George Pomeroy, of Madison, N.J., died June 24, 1880, leaving a will, dated July 22, 1875, and an estate valued by him a few months before his death at $893,000, consisting of personal property estimated to be worth $538,000, and lands in New Jersey, New York and Missouri valued by him at $355,000. The personal estate, however, when inventoried was appraised at $480,000. His family and heirs at law then consisted of his wife, Abba S., and four children, George P., Edward, Julia and Josephine. His will was duly probated at Morristown, N.J., and letters testamentary issued to Edward Pomeroy and Alfred Mills, who were appointed in the will as his executors. Edward Pomeroy died March 6, 1887, whereby Mills became, and still is, sole executor.

The estate of George Pomeroy was disposed of under his will as follows:

a. The executors were authorized to deliver to the New York Life Insurance and Trust Company securities to the amount of $50,000, to be held in trust for the benefit of his wife during her life, and upon her death to divide the securities and proceeds equally between the three younger children, Edward, Julia and Josephine. His wife died in February, 1883.

b. Securities to the amount of $30,000 were directed to be deposited with the same company, to be held in trust for the benefit of his son, George P., during his life, and at his death such securities and the proceeds thereof were also to be divided among the three younger children. George P. Pomeroy subsequently married Harriet Cowles, of Cleveland, who died after giving birth to a son, Eugene C. Pomeroy. George P. Pomeroy himself died in November, 1887.

c. The testator directed that no partition or sale of his real estate should be made until his executors should have sold

real estate to the amount, of at least, $100,000; and further directed that the proceeds of the first of such sales should be deposited with the same company until the amount should reach $100,000, which should be held and invested for the benefit of his two daughters, Julia and Josephine, with instructions to collect and pay to each of them the interest on $50,000, and in case of the death of either of them without issue to pay such trust fund in equal shares to his son Edward and his other daughter, and the survivor, (if one of them be dead,) the issue of said Edward and of said other daughter representing their parents respectively.

d. The residue of the estate, aside from some immaterial legacies, was devised to his three younger children, Edward, Julia and Josephine, in equal parts. It was provided that the homestead at Madison, N.J., should be kept up by the three younger children so long as they and the widow could live harmoniously together, etc.

As between the two executors, Edward Pomeroy took charge of the personal assets of the estate. As directed by the will, the trust fund of $50,000 for the benefit of the widow, and that of $30,000 for the benefit of George P., were established by placing with the New York Life Insurance and Trust Company the requisite securities.

George P. Pomeroy had been trained for public life, and was abroad most of the time, engaged in the foreign diplomatic service of the United States. During his absence a quarrel arose between Edward and his sisters Julia and Josephine, in which the latter claimed that he had wasted their estate, and was indebted to them in the aggregate amount of $252,000. To recover this amount the sisters brought suit against Edward in one of the courts of New York. In that suit they charged that Edward had speculated in stocks with the funds derived from the estate of his father, and had made large profits in which they should share, and had suffered losses with which they should not be charged. Prior to this suit, however, and in February, 1885, he turned over to each of them securities to the amount of $50,000, besides some small annual payments in cash.

Statement of the Case.

That suit was still pending when Edward Pomeroy died, on March 6, 1887, leaving a will, in which, after making some small legacies to the amount of $6500, he devised his entire estate to his brother George, and made him sole executor. His will was duly admitted to probate May 2, 1887. George P. Pomeroy declined to act as executor, and Frank R. Chandler, the plaintiff, was appointed administrator with the will annexed.

Shortly before Edward's death, namely, February 24, 1887, George P. Pomeroy, then living in Paris, executed a will leaving his entire estate to his infant son Eugene, then about seven years old; but in case he should die before reaching the age of 21 years and without leaving issue him surviving, the estate was to go to Mrs. Martha E. Buckingham and her daughters, Mrs. Chandler, plaintiff's wife and Rose A. Buckingham, and to the survivor of them, Mary E. Van Aulen and Frank R. Chandler. Upon certain contingencies Chandler was to become executor of this will.

When Edward died his brother George was in Europe; plaintiff Chandler was his business agent in America, and had had general charge of his affairs for some years. Very soon after Edward's death Chandler entered into negotiations with the sisters for the purpose of bringing about a settlement of the controversy, if possible, between them and their brother George P. Pomeroy, and in connection with this certain cable messages passed between George and his sisters in reference to the proposed settlement, which was embodied in an agreement bearing date April 13, 1887, but actually executed May 2.

This agreement was executed at Morristown, N.J., and was signed, sealed and acknowledged by George P. Pomeroy, Julia P. Morrison, and William F. Morrison, her husband, and Josephine Pomeroy. After reciting in substance that Edward, at the time of his death, was indebted to the three younger children, or some one or more of them, to an unknown amount; that the parties desired to settle the estate of their father and their brother Edward without litigation, and to adjust the claims of the parties against Edward's

estate, suppressing and terminating the suits brought against him and pending when he died; and that they desired to vacate the provisions of their father's will in order to be equally charged with, and equally to share in, the estates of both George Pomeroy and Edward Pomeroy, and to settle said estates and determine the value of the shares of each of said heirs, they agreed in substance as follows:

1. The remainder of the estate of George Pomeroy, the father, was to be equally divided among his three living children, Julia, Josephine and George P.

2. This division to be made as of the date of the death of the father.

3. To arrive at the interest to which each should be entitled at the date of the agreement, each was to be charged with the amount he or she had received, with six per cent interest from the date of receipt to the date of the document, payable annually.

4. The estate of Edward was to be divided and distributed equally between George P. and his two sisters, after payment of his just debts and the specified legacies of $6500.

5. In case it should be found that the personal property of said George or said Edward could not be equally distributed in kind, then so much as might be necessary to be sold and the proceeds divided.

6. The real estate of said George and of said Edward, wherever situated, and by whomsoever held, to be conveyed by good and sufficient deeds so that each of the three parties should hold an undivided third thereof as a tenant in common with the others.

7. In the division of the said estate, the proceeds or revenue to be derived from the trust fund for the benefit of George P., Julia and Josephine, created by the will of their father, to be treated as a joint fund and divided equally between them, and, so far as it lay in their power, the parties agreed that the said trust fund should be considered and be the joint fund of the parties.

The bill set forth these facts in substance, and prayed for a decree declaring the settlement valid; that Julia and Joseph-

ine render an account of the property received from both estates under such agreement; and that there be a reference to a master to take such account; that the $30,000 trust fund in favor of George P. Pomeroy be delivered to him with its earnings and income; and that the surviving executor, Mills, be directed to proceed and complete the execution of the will and to pay over to the plaintiff property equivalent to the trust fund of $100,000 in favor of Julia and Josephine; and for a receiver.

The answer of Josephine and Julia denied that, in any of the proceedings preceding the execution of the settlement, any suggestion or mention was made that the several trust funds provided for in the will, the $30,000 for the benefit of George P., or the two funds of $50,000 each for the benefit of the defendants Julia and Josephine, should be included therein; and that nothing was at any time said which led them to suppose that said trust funds were to be included in the proposed settlement; nor was any mention made of any landed estate or of any accounting for moneys received by these defendants or Edward since the death of their father; and that the agreement was signed without consulting counsel, upon the advice of plaintiff that they should not do so. They denied that the minds of the parties met, and averred that they never were aware that the settlement included these trust funds until after the execution of the settlement, and upon the evening of the same day, when they were informed by plaintiff of its terms; when they at once repudiated that portion of the agreement, and have always refused to recognize it as binding upon them, so far as it proposes to cover the trust funds.

A supplemental bill was subsequently filed praying for an injunction against the prosecution of a certain suit brought by Josephine in New Jersey for a partition of, or sale and partition of, the proceeds of the lands of George Pomeroy; and also of another suit brought by the sisters in Missouri for a partition of the lands of which George Pomeroy died seized. Upon the filing of this supplemental bill an injunction was granted, which is still in force.

Argument for Appellees.

Upon the final hearing in the Circuit Court upon pleadings and proofs, the original bill was dismissed for want of equity. (46 Fed. Rep. 533.) From this decree the plaintiff appealed to this court.

Mr. Charles C. Bonney for appellants.

Mr. George W. Smith and *Mr. John Maynard Harlan* for appellees.

I. No decree in favor of complainant was practicable.

There was by the will of the elder Pomeroy no devise to the executors. By the filling of the $100,000 fund, the power of Mills, surviving executor, was exhausted. He could not thereafter sell the unsold real property. Neither by the cable messages nor by the agreement of April 13, 1887, was the attempt made to authorize him to sell.

If then, the realty is to be converted into personalty, it must be done by or under the general equity jurisdiction of the court. The persons or class of persons who will ultimately receive or be entitled to take the principal of the $100,000 trust fund, are as yet unknown. The legacy was to the trust company in trust to pay the income of one half to Julia for life, and of the other half to Josephine for life. At the death of either, leaving issue, the principal of one-half was to go to such issue, and in default of issue to the survivor and Edward. It was a gift to survivors, at the death of a person in being, and by the established rule should take effect only at the time of such death. *Newberry* v. *Blatchford*, 99 Illinois, 11, 42.

Edward has died leaving no issue, and the sisters are living. Suppose one should die leaving issue, the issue not yet known would take. Suppose one should die leaving no issue, would the surviving sister take the whole as survivor, or would she take jointly with the heirs of Edward? Suppose both sisters should die leaving no issue of either, would their heirs take, or would the heirs of Edward share with such heirs? Is the residuary estate the subject of executory gift by either Julia or Josephine? All these are questions suggested by the

clause of the will relating to the $100,000 fund, not necessarily or perhaps even properly answerable here. Until the death of one of the sisters it is impracticable to make a rule for equalizing the distribution of this fund.

II. Chandler represented the sisters in the negotiations of 1887. His duty was to all alike, in so far as to see that all alike understood what they were doing, and that neither was misled or deceived. The obligation rested upon him at the hearing to show that in all respects he had fully and fairly performed his duty. The burden of proof was on him to show that the supposed contract was free from the bias of his personal influence, and that there was no mistake or misapprehension of its terms on the part of either of the sisters. How far he came short of complying with the well founded and well known rule in this regard, the evidence will show.

III. The question must be dealt with as primarily one of business, with enough only of sentiment in it to dispose the parties to a settlement upon a reasonable basis. If, in view of all the circumstances at the time, the agreement was executed — in view of the position of vantage the sisters held, and that of disadvantage George P. held, in view of the scope of the controversy then to be settled, and of the conduct of the parties, including Chandler, it appears that the agreement is inequitable, that there is no equality in it, as that term is properly used, then this court will not reverse the decree of the lower court refusing specific enforcement. Before a court of equity will grant such relief it "must be satisfied that under all the circumstances it is equitable to give more relief than the plaintiff can have at law." *Marquis of Townshend* v. *Standgroom*, 6 Ves. 328, 332.

In this connection counsel adverts to the fact that no cross-bill has been filed, apparently thinking the failure to ask for an annulment or alteration of the agreement militates against the defence here by appellees. But the point is not well taken, for the sufficiency of appellees' defence to appellants' prayer for affirmative relief does not depend upon whether upon a cross-bill or original bill, appellees could have had the odious provisions of the agreement annulled. *Mortlock* v. *Buller*, 10

Ves. 292, 307; *Cathcart* v. *Robinson*, 5 Pet. 264, 276; *Hennessey* v. *Woolworth*, 128 U. S. 438.

IV. The agreement contemplated a division of the income only, during the joint lives of the parties.

V. George P. Pomeroy had an advantage in the distribution in 1887.

Mr. Justice Brown, after stating the case as above reported, delivered the opinion of the court.

This case turns solely upon the question whether the settlement or compromise of May 2, 1887, between the sister Julia, her husband, and her sister Josephine and their brother George P. Pomeroy, was executed under such circumstances as to call upon a court of equity to enforce its specific performance. This involves the subordinate question whether the sisters were imposed upon in giving their assent to this settlement.

Some years before its execution a quarrel had arisen between Edward and his sisters, which had culminated in a suit brought by the latter, in which they had charged their brother with speculating in stocks with the funds derived from their father's estate, and with having made large profits in which they ought to share, and suffering losses with which they ought not to be charged. This suit had intensified the bitterness felt by Edward to such a degree that, in making his will, which was executed October 23, 1886, he left his entire estate, less a few legacies amounting to $6500, to his brother George, making him also his sole executor. This will only served to complicate matters still more, as Edward had never settled with his sisters for their share of his father's estate, and was also thought by some to have made a large fortune in speculations in which his sisters would have been entitled to share, in the absence of a will. Their brother George had received under the will of their father only the income of $30,000, with a proviso that, at his death, the principal should go, not to his children or heirs, but to his younger brother and his sisters — an inheritance far less than he would have received had no will been made. Thus Edward, in bequeathing to his brother

George his interest in his father's estate, gave him but little more than he would have received under the natural laws of inheritance, but in giving him his own estate, which was thought to be very large, he ignored his sisters altogether. Under this state of facts there was nothing unnatural in the suggestion that the estates of the father and Edward should be added together and divided equally among the three surviving children. If it had turned out that Edward had made a large fortune it might have been an advantage to his sisters to share in it; if not, Julia and Josephine would at least have obtained a settlement of their suit with the estate, and have admitted their brother George to his natural inheritable share of his father's estate. From a fraternal point of view it was not an unwise proceeding, although from a pecuniary standpoint it was, as characterized by one of the witnesses, "a leap in the dark."

Edward died March 6, 1887. His brother was in Europe, and his sisters in New York. The first suggestion of a settlement came immediately after Edward's death, from a Mr. Chapman, who had been a neighbor of George Pomeroy in Morristown, and acquainted with the sisters for twenty-five years. He went to their hotel the very day of Edward's death, and met the two ladies, Mr. Morrison and Mr. Cowles, and made a proposition to divide the securities, making no mention in his conversation of the trust funds created by the father's will. His own statement of the proposition is as follows: "Now, says I, I will make a proposition: 'Let bygones be bygones; let's take the thing as it stands to-day; put the securities all into a hat and shake them up and divide them into three parts — George one-third, and the girls each one-third; that would settle the whole difficulty. Whatever Ed. has lost, let it come out of the girls' share, if he had lost any, if he had lost more than he had made; but to settle it up and divide it into three parts, but to start as it stood to-day.' That was the proposition — all I had to say about it. . . . Not a word" was said in regard to trust fund or back charges. "There couldn't have been anything said about back charges, for my proposition was to take the things as they stood then;

let all that Edward lost and all that go, and just start in and take the securities and things as they stood then and divide it, so there couldn't have been anything said in regard to any back accounts that they had, and as to the trust fund there was no question or nothing. . . . My understanding was that they" (the sisters) "approved of it, and so did Mr. Cowles." In narrating a subsequent conversation with Mr. Chandler in regard to this, he testifies: "I merely said 'I said nothing when I made the proposition about the trust funds, from the fact that I didn't suppose the girls had any right to the trust funds.'" He again testifies: "Every one agreed to it, and, as I say, I thought the girls would be the loser by a small amount, but then I looked upon it that they had better lose a few thousand apiece than to be running after lawyers any longer. They had been hampered with lawyers a good while and worried to death, and I felt it was better for them."

It seems that Mr. Cowles, who was the father-in-law of George P. Pomeroy, also advised an ending of the litigation, and a division of whatever was left equally among the three. Mr. Morrison, Julia's husband, testifies: "'Whatever was left' we understood as what was left by the father of the father's estate; also in the sense of what was left from the speculations that Edward had made, perhaps the wreck of the estate; whatever there was, large or small, as matters then stood. . . . Mr. Cowles said that he was going right over to Paris, to London at least; that he would see George and urge this upon him." Very soon after that Mr. Cowles left for Europe. Shortly after the death of Edward, and on March 12, Julia wrote to her brother, who was abroad, urging him to return home at once and attend to the probating of the will, and watch his own interests. Regarding the proposed settlement, she wrote as follows: "Now, I have a proposal to make to you. Suppose we do away with all lawyers in the settlement of our affairs, for they expect $50 or $100 every time they look at you. You appoint Frank Chandler, who is unquestionably your friend; we appoint Mr. Morrison, who is undeniably a friend to both parties. Let nothing be binding. Frank and my husband are both capable and honest men. Let

them look over the securities together in our presence and try and settle between yourselves. We will avoid expense by so doing; but this we can discuss when you return. I only speak of it now so that you can reflect upon it at your leisure. You have, of course, seen and talked with Mr. Cowles by this time, and you know you inherit all of Edward's personal and real estate, excepting a few legacies. My advice is to get your property and enjoy it while you live, and to let all wrangling cease, which diminishes the capital, puts every one in hell," etc.

The next day Mr. and Mrs. Morrison went to Newport, leaving their sister Josephine in New York. While at Newport a correspondence was opened between Chandler and Mrs. Morrison, which is not all produced, although Mr. Chandler states the substance of his own letters to have been that the three children, Julia, Josephine and George, were to receive, past, present and future, exactly the same, and in the adjustment as to the time of receiving to be equalized on a six per cent basis for money.

On April 6, however, Julia writes to the plaintiff from Newport as follows: "I am willing to agree to your plan of settlement, and promise you now to do so. But how about the trust fund? Do you mean to cancel that and George's thirty thousand trust fund, too, and lump all together? This we would prefer, as our trust fund will only yield each $1500 or $1800 a year. George gets more on his $30,000 than we would on $50,000. I am afraid that Mr. Mills will not let us relinquish this in behalf of the estate. He wants his commission. What are we to do about this?" A few days afterwards, on April 13, she writes him as follows: "Josephine and I are willing to settle this matter as you propose unless we find there is but a small estate left. In that case I think we should be allowed to keep the trust fund in excess, in order to make up in a measure for Edward's speculative transactions with our money. This, I am sure, you will consider fair. If the estate is large, as it ought to be, we can lump all together and share alike." About the same date Josephine writes a letter to her aunt, Mrs. Van Aulen, which contains the following: "I am awfully

afraid Edward was poor; but if we are willing to sign this agreement, so as to stop all litigation, we will not go back on it. Why should George wish to be richer than we, or we wish to be richer than him?" The plaintiff also had some correspondence with Josephine. Before going to New York, and in pursuance of this correspondence, Mr. Chandler had the proposed settlement drawn up in the form in which it was afterwards signed, by one Gill, a lawyer of Chicago. It was drawn up in triplicate on the 7th or 8th of April, and dated the 13th, though it was not actually signed until May 2. Upon his arrival in New York, which was on April 11, he called upon the sisters at a house upon Madison avenue, and testifies as follows regarding the interview: "I requested that they should take that agreement to their counsel who was conducting the litigation against their brother Edward. They consented to do so. The next day, after our first interview, they were to go with me to see Hill, Wing & Shoudy, their attorneys in William street, and consult with them. I told them they should not under any circumstances settle the suit against Edward without consulting with their counsel in regard thereto, or to sign this agreement that I proposed." He further swears that the ladies being ill, he went to Mr. Shoudy's alone, and showed him the document; that he read it over, and said he would like to retain it over night, and the next day he would be able to tell Mrs. Morrison what she had better do; that Mrs. Morrison went down with him the next day and found Mr. Shoudy in the office; leaving Mrs. Morrison there he went out for a short time, and soon returned and asked what the result of the consultation was. To use his own language: "Mrs. Morrison spoke up and said: 'Mr. Shoudy says we are taking a great leap in the dark, but nevertheless we will settle. We will carry it out. We will make the settlement.' At that time Mrs. Morrison gave her acquiescence in my plan of settlement, and Josephine, whom we saw afterwards, approved of it also. The difficulty then was to get their brother George to give his consent. Although I had authority to act generally for him, I did not feel that I could sign such an important settlement, which involved a very large sum of money, without positive

and direct instructions." Josephine says of the interview on Madison avenue, before the visit to Shoudy's office: "Mr. Chandler called one morning with my aunt, Mrs. Van Aulen. . . . After that Mr. Chandler took out a paper from his pocket — I think about two sheets — and said he wanted to read us a few lines of what he had jotted down on his way from Chicago — his plan of settlement or proposal. I told him I was too ill to listen to him; I could scarcely sit up — hold my head up — but he insisted on my staying; so we listened to him reading it through, and it was very ambiguous; and when he finished, I said, 'Frank, I don't understand that.' It was very ambiguous. Then my sister said, 'Does it mean to divide up what is left?' He said, 'Yes; it means that.' That was all that was said on the subject of business at that interview."

Chandler remained in New York for a week, seeing the sisters almost daily, and, in order to obtain the consent of George, who was then in Europe, made use of the cable, and the following telegrams passed between the parties. As these telegrams constitute an important part of the correspondence they are reproduced in full:

"New York, April 15, 1887.

"To Chandler, sixty-three Pierre Charron, Paris.

"Power received. Doubtful value. Have George sign cablegram himself, authorizing settlement equal division father's, brother's estate, *including the trusts*, and renouncing executorship, if necessary. Mary and I advise settlement before Edward's condition known. None seeking advantages, but peace, equality. No confidence in us; get somebody else.

"(Signed) FRANK."

Chandler, who produced this cablegram, explained the address as meaning his family's apartment in Paris, where Mr. Cowles and Mr. Pomeroy then were, and the contents of the telegram by saying that the settlement was based upon a principle and not upon a result. "I felt that if Edward's estate proved very small the sisters would not settle; if it proved very

large, the brother would not settle." It is at least doubtful whether the sisters ever saw the telegram. To this telegram the following answer was received:

"Paris, 4, 17, 1887.

"To Frank Chandler, St. James Hotel, New York.

"No litigation. Will allow sisters just rights on arrival thirtieth. Please arrange all other important business. Address American Exchange, London.

"(Signed) GEORGE POMEROY."

To this he replied as follows:

"To Pomeroy.

"Dispatch unsatisfactory. You don't understand situation. Return Chicago Tuesday. Henceforth manage your own affairs. (Signed) FRANK CHANDLER."

On April 19, Pomeroy telegraphed from London to his aunt, Mrs. Van Aulen, as follows:

"London, April 19, 1887.

"To Van Aulen, 675 Fifth Avenue, New York.

"I accept proposition to share equally with sisters in father's and Edward's estates, *including all trust funds.* Legal expenses both sides and Edward's debts to be paid out of joint estate."

Upon the same day the three ladies cabled Mr. Cowles as follows:

"Edwin Cowles, American Exchange, London, Eng.

"Proposition accepted by us, but George must come home immediately. Frank cannot act without him; losing money.

"(Signed) JULIA and JOSEPHINE and VAN AULEN."

Upon the same day Mr. Cowles cabled as follows to Mrs. Van Aulen:

"George cables acceptance proposition. I have a duplicate with his signature. He will act good faith. He is ill, not fit

to travel alone; cannot he wait till I sail May 7th, wants to finish medical treatment; answer immediately American Exchange, as he leaves morning Germanic.

"(Signed) COWLES."

Upon the same day Julia also telegraphed to Mr. Chandler, who had returned to Chicago, as follows:

"New York, 19.

"To Frank B. Chandler, 110 Dearborn Street, Chicago, Ill.

"George accepted terms; he arrives next week; will write you in full."

She also wrote him a letter of same date, enclosing copies of the telegrams from Cowles and George P. Pomeroy and the replies to them. About the 30th of April Mr. Chandler returned from Chicago to New York, and went a day or two afterwards to Morristown, where he met George P. Pomeroy, who in the meantime had returned from Europe, and the sisters. They went directly to the office of Mr. Halsey, an attorney at that place, where the agreement was signed. At the same time the will of Edward Pomeroy was admitted and proved. George P. Pomeroy renounced the executorship, and Mr. Chandler qualified as administrator with the will annexed. In the interview at Mr. Halsey's office something seems to have been said to the effect that the trust funds could not be touched. But it seems to have been only an incidental remark, not assented to by Mr. Chandler, probably not heard by him, as he was deaf, and not made the subject of discussion. That evening there was a meeting of the parties at their house in Morristown, when the agreement was read, its contents explained by Mr. Chandler, and, as the sisters now claim, the agreement with regard to the back charges and trust fund was first called to their attention. The interview was evidently a stormy one, the sisters threatening to repudiate the agreement, and insisting that they were dividing up what was left; that if he ever attempted to force this he could only do it by law through the courts; and that they did not know it was in the agreement or anything about it. Mr. Chandler insisted

that, as they had signed it, they were bound by it. He claims, however, that the only dispute was with regard to the interest and the method of making an accounting, and it is proven that the following memorandum was made and handed to him that evening or soon after:

"To F. R. Chandler.

"SIR: In figuring interest on the accounts in accordance with the agreement of April 13th, 1887, it is understood that interest shall be figured to May 1, 1887, and all sums that come between the 1st and 15th of any month shall be called to the first of that month, and between the 15th and 30th of any month, then to the 1st of the following month."

This was signed by George P. Pomeroy and the sisters.

Conceding that the sisters had not read the agreement or demanded that it be read to them before they signed it, as they were bound to do, and that their counsel, Mr. Shoudy, had not informed them of its terms as fully as he might have done, it is difficult to see how, in view of the telegrams between the parties in New York and those in Europe, and their own letters, they could have understood that the trust funds were not included, if they understood the force of language. Not only did George's telegram, a copy of which Julia enclosed in her letter of April 19 to Mr. Chandler, expressly mention "all trust funds," but it was also mentioned in the original telegram from Chandler to Mr. Cowles of April 13, of which she probably knew the contents, and her reference to it in her two letters from Newport of April 6 and April 13, puts it beyond controversy that the propriety of including the trust funds was made a matter of discussion. Their conduct subsequent to the agreement tends strongly to show their acquiescence in it. On the 9th of May they executed a power of attorney to Chandler to settle and dismiss their suits in Missouri and to take charge of their property there. Upon the same day they executed a bond reciting their authorization to him to make a distribution of the estate of Edward Pomeroy, and to pay it to the legatees and devisees named in

his will, and agreed to indemnify him against any debts which should be recovered against the estate. On the following day Mrs. Morrison writes to her aunt, Mrs. Buckingham, expressing her pleasure at the settlement of their troubles, "since we have signed an agreement to *wipe out all wills* and divide what is left, share and share alike. Frank will charge us with all our personal expenses since father's death, which is perfectly proper, but he only proposes to charge George with what he received from the trust fund left him by father, and not one cent of all the surplus he got out of mother and of you for mother's effects."

During the summer an active correspondence was carried on between Mr. Chandler and the two sisters with relation to the settlement of the estates upon the basis of their agreement, in which repeated allusion was made to the trust fund and to an equal division of the income of the same, and no suggestion on the part of either party that they were not understood to be included. Julia repeatedly expressed her pleasure that the settlement had been effected, and at the manner in which Mr. Chandler was proceeding to wind up the estates. Not only this, but the parties proceeded so far in the execution of the settlement that the two ladies turned over to the plaintiff securities to the amount of $109,153.33, to which were added the estate of Edward Pomeroy, ($190,000,) that of George Pomeroy, ($119,000,) and the insurance upon the life of Edward in the amount of $8000, and a dividend declared in securities of $73,896.67 to each of the defendants, in addition to a cash dividend of $54,000 to each. The defendants also received from Mr. Chandler two-thirds of the income collected July 1, 1887, from the life insurance and trust company on the $30,000 trust fund of George P. Pomeroy, *i.e.* that proportion dating from May 1, according to the agreement of settlement. They also paid over to him one-third of the income for the same period of their own trust fund of $100,000. Indeed, their relations seem to have been of the most friendly description until the death of George in November. When the contents of his will were made known this controversy arose.

We have searched the record in this case in vain for evidence that the plaintiff brought about this settlement by any fraud, misrepresentation or undue influence. Undoubtedly the defendants had confidence in Mr. Chandler's integrity, his knowledge of business, and his acquaintance with these estates; it is possible that he was better informed of the amount of Edward's estate than they, but there is nothing to indicate that he made use of this information to deceive them as to its value. Their motive in entering into this agreement was doubtless an honorable one. They had been engaged in a long and apparently bitter quarrel with their brother Edward over the supposed misappropriation of their father's estate. George had been, to use Mr. Morrison's own language, "practically disinherited by the father. His sisters had not broken the father's will and reinstated him. This had made George very sore. The aunt and uncle suggested and pressed upon the ladies the fact that they then had the opportunity to bring about a perfect reconciliation and peace with their brother; that if litigation was stopped and all that there was divided up equally among the three, what was left, that this desirable result would probably be accomplished." The sisters had themselves been excluded from Edward's will, and there was at least a possibility that his estate would be large enough to make an equal division of both estates advantageous to them. Under these circumstances, and for the sake of peace, they agreed to the settlement. If equality be equity, we see no reason why it should be disturbed. From a financial point of view the agreement may have been a mistake. They acted, however, not without deliberation, and with at least an opportunity of consulting with counsel and with Mr. Morrison, in whom they seem to have perfect confidence. But if the venture turned out unfortunately for them, it is difficult to see in what particular plaintiff was to blame.

Much stress was laid by the court below upon the fact that Mr. Chandler advised the sisters not to consult with a lawyer with regard to the proposed settlement. This was strenuously denied by Chandler; but whether this be so or not, it is evident that the first proposal not to consult with a lawyer came

from Julia herself in her letter of March 12 to her brother George, in which she makes the distinct proposal to "do away with all lawyers." But at any rate, the fact is indisputable that they did consult their counsel, Mr. Shoudy; and that the plaintiff accompanied them to his office, and handed him a copy of the agreement, which he retained over night, although Mr. Shoudy testifies that his advice was not sought as to the propriety or advisability of the agreement. He seems, however, to have made no objection beyond the suggestion "that it was a leap in the dark," and if the defendants had any doubts themselves about its propriety, they should have consulted him upon the subject.

Reliance is also placed upon the frequent use, both in the correspondence and in the oral testimony, of the words "dividing up what was left." These words are, however, susceptible of two constructions; they may refer, as contended by the defendants, to the residue of the estates after laying aside the trust funds; or they may refer to what was left over and above what the children had spent or Edward had lost, if any, in speculation. Indeed, these words are so ambiguous as to be an unsafe guide in ascertaining the actual intent of the parties.

In order to justify the court in refusing to enforce a family settlement of this kind upon the ground that it was obtained by an active or covert misrepresentation, or that it failed to express the real intent of the parties, the testimony should establish the fact clearly and satisfactorily. In this case, however, all or nearly all the written testimony tends to corroborate rather than to impeach the agreement, and it is only by resort to oral evidence of facts asserted by one party and denied by the other that any doubt whatever is thrown upon the intent of the parties. That Mr. Cowles, who was one of the first to talk with the sisters regarding the settlement, did not suppose the trust funds were to be excluded is manifest from a letter written by him to George P. Pomeroy, March 18, before he left for Europe, in which he says: "The girls have made this proposition in order to settle the litigation: That you give up your claim to the annuity you have,

they give up their claim to the special legacy of $100,000 left them in your father's will, and that all property, landed and personal, be divided equally among all three of you." It was apparently upon the basis of this letter and his subsequent conversations with Mr. Cowles that Pomeroy cabled his acceptance of the proposition. The letter was written after his interview with the sisters, and in all probability he stated the agreement as he understood it from them. He would scarcely have ventured to impose upon George by manufacturing a different story. Under the circumstances it seems to us very improbable that the parties could have contemplated that securities to the amount $130,000, worth $142,000, should be withdrawn and not taken into account in the division, or that George would ever have consented to the agreement with that reservation.

We do not find it necessary upon this appeal to put a construction upon this agreement, to determine whether it applies to the principal as well as the income of the trust funds, or whether in this suit the court may proceed to a partition of the real estate. These questions will arise more properly upon the settlement and enforcement of the decree. It is sufficient for the purposes of this case to hold, as we do, that the settlement was a valid one, and that the defendants should be required to account under the written agreement so to be construed.

The decree of the court below will be reversed and the case remanded, with instructions to enter a decree for the plaintiff, and for further proceedings in conformity with this opinion.

CHICAGO & GRAND TRUNK RAILWAY COMPANY *v.* WELLMAN.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 1031. Argued and submitted January 20, 1892. — Decided February 29, 1892.

The act of the legislature of Michigan of June 28, 1889, (Public Laws of 1889, pp. 282, 283,) fixing the amount per mile to be charged by railways for the transportation of a passenger, violates no provision in the Constitution of the United States, so far as disclosed by the facts in this case.

A legislature has power to fix rates for the transportation of passengers by railways, and the extent of judicial interference is protection against unreasonable rates.

Whenever, in the pursuance of an honest antagonistic assertion of rights, there is presented a question involving the validity of any act of any legislature, State or Federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must determine whether the act be constitutional or not; but it never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.

Courts should be careful not to declare legislative acts unconstitutional upon agreed and general statements, and without the fullest disclosure of all material facts.

In 1889 the legislature of the State of Michigan passed an act, number 202 of the Public Acts of that year, pages 282 and 283, by which, among other things, section 2333 of Howell's Statutes, being a part of the railroad law of that State, was amended. So far as affects the matters in controversy here, it is enough to quote from the ninth paragraph, referring to the powers and liabilities of railroad companies. That is as follows:

"Ninth. To regulate the time and manner in which passengers and property shall be transported and the tolls and compensation to be paid therefor; but such compensation for transporting any passenger and his or her ordinary baggage, not exceeding in weight one hundred and fifty pounds, shall not exceed the following prices, viz.: For a distance not exceeding five miles, three cents per mile; for all other distances, for all companies the gross earnings of whose passen-

ger trains, as reported to the commissioner of railroads for the year one thousand eight hundred and eighty-eight, equalled or exceeded the sum of three thousand dollars per mile of road operated by said company, two cents per mile, and for all companies the earnings of whose passenger trains reported as aforesaid were over two thousand dollars and less than three thousand dollars per mile of road operated by said company, two and a half cents per mile, and for all companies whose earnings reported as aforesaid were less than two thousand dollars per mile of road operated by said company, three cents per mile."

Prior thereto the regular fare charged on plaintiff in error's road from Port Huron to Battle Creek was $4.80, the distance being 159¾ miles. On the very day on which the law took effect, to wit, October 2, 1889, the defendant in error, plaintiff below, went to the defendant's office in Port Huron, and tendered $3.20 for a ticket from that place to Battle Creek, which was refused. Thereupon he brought this action in damages, to which the railroad company promptly answered; and on November 22, 1889, less than two months from the time the law went into effect, the case was tried and a verdict and a judgment entered in favor of the defendant in error for the sum of $101, an amount sufficient to take the case to the higher court. On the trial it was agreed that the railroad company's earnings on its passenger trains for the year 1888 exceeded three thousand dollars per mile; that its capital stock was $6,600,000, and had been fully paid in; that its bonded debt was $12,000,000, one half bearing six per cent and the other half five per cent interest, payable semi-annually; that the capital stock and mortgage debt represented an actual amount paid into the corporation; that the railroad property was at the time worth more than the capital stock and mortgage debt; and that in addition to the mortgage debt there was a floating debt of the amount of $896,906.40. Further, the following tabulated statement of the earnings and expenses for the year 1888 was admitted to be correct:

"7th. That the total earnings and income of the defendant from all sources for the year 1888 was $3,228,338.17.

Statement of the Case.

"Of this amount there was received from passenger traffic the sum of	$1,065,502 94	
"And from freight traffic the sum of	2,160,180 23	
"From miscellaneous sources	2,655 00	
"Total		$3,228,338 17
"8th. That defendant's operating expenses for the year 1888 were	$2,404,516 54	
"The interest paid on its bonds was	661,335 36	
"Other necessary expenses, including interest on part of the unfunded debt, rental of cars, tracks, &c.	150,305 61	
		$3,216,157 51
"9th. That, in addition to the foregoing expenses, defendant paid during the year 1888, from its earnings, on account of interest on bonds not paid in previous years		12,257 94
		"$3,228,415 45"

In addition to this agreed statement of facts two witnesses were called, one the traffic manager and the other the treasurer of the plaintiff in error. Their testimony was substantially that, in view of the competition prevailing at Chicago for through business, it was impossible to increase the freight rates then charged by the company, because it would throw the volume of business into the hands of competing roads. Upon such agreed statement and testimony, and that alone, the railroad company asked an instruction that the act of 1889, referred to, was unconstitutional. The court refused this instruction, and an exception to the refusal to give this

instruction was the solitary one taken on the trial. The court proceeded to charge the jury that the act in question was valid, and that the plaintiff was entitled to a verdict and judgment by reason of the failure of the defendant to comply with its provisions. To this charge no exceptions were taken, and the case went to the Supreme Court of the State on the single exception above stated. That court sustained the ruling of the trial court, and affirmed its judgment, 83 Michigan, 592; to reverse which judgment, the railroad company sued out a writ of error from this court.

Mr. George F. Edmunds for plaintiff in error. *Mr. E. W. Meddaugh* was on the brief.

Mr. A. A. Ellis, Attorney General, of the State of Michigan, on behalf of the State, for defendant in error.

Mr. William T. Mitchell, for defendant in error, submitted on his brief.

Mr. Justice Brewer delivered the opinion of the court.

The single question presented on the record is, whether the trial court, on the facts presented, erred in refusing to instruct, as a matter of law, that the act of 1889 was unconstitutional. It will be noticed that that act does not interfere with the rates of freight; it simply regulates passenger fares; also, that there was no agreement that the freight rates could not be so changed as to increase the revenues therefrom. There was in evidence the opinion of two gentlemen, doubtless well informed and worthy of credit, that an increase of freight rates was inexpedient and futile, and would tend to diminish rather than increase the income from freight. But the question was not submitted to the jury as to whether they believed that an increase of freight rates would work a reduction of the income from freight, nor even whether they believed that a reduction of the passenger tariff between Battle Creek and Port Huron would not so increase the travel as to increase the earnings therefrom; but the court was asked

to peremptorily charge the jury that the law fixing the passenger rate was unconstitutional. In other words, the instruction asked amounted to this, that, as matter of law, the opinion of these two witnesses as to the effect of raising the freight tariff upon the earnings was conclusive; that, as like matter of law, the reduction of passenger tariffs would not so increase the amount of passenger business as to increase the revenues, but would, on the contrary, diminish the earnings therefrom; that such reduction would operate to so far diminish the earnings of the road as to prevent the payment of operating expenses and fixed charges; and, therefore, that the act was unconstitutional in its application to this company; or else, that the legislature had no power in respect to the matter, and that an act prescribing maximum rates was necessarily unconstitutional, although the rates authorized might be so high as to enable every company to pay therefrom all expenses and large dividends to stockholders.

In this connection it is worthy of note that while, by the agreed statement, the previous passenger rate between Port Huron and Battle Creek was $4.80, which was the same rate per mile that defendant uniformly charged all other persons for transportation upon its road, yet from the report of the defendant, made to the State of its business for the year 1888, and which we are invited by its counsel to examine, it appears that the average rate of fare per mile for all passengers was $.0162, being .0038 less than the maximum rate fixed by the act in question.

Can it be, under these circumstances, that the court erred in peremptorily refusing to instruct the jury that an act fixing a maximum rate at two cents per mile is unconstitutional? Is the validity of a law of this nature dependent upon the opinion of two witnesses, however well qualified to testify? Must court and jury accept their opinions as a finality? Must it be declared, as matter of law, that a reduction of rates necessarily diminishes income? May it not be possible — indeed, does not all experience suggest the probability — that a reduction of rates will increase the amount of business, and, therefore, the earnings? At any rate, must the court assume

that it has no such effect; and ignoring all other considerations, hold, as matter of law, that a reduction of rates necessarily diminishes the earnings? If the validity of such a law in its application to a particular company depends upon a question of fact as to its effect upon the earnings, may not the court properly leave that question to the jury and decline to assume that the effect is as claimed? There can be but one answer to these questions. If the contention be that the legislature has no power in the matter, and that an act fixing rates, however high they may be, is necessarily unconstitutional, it is enough to refer to the long series of cases in this court in which the contrary has been decided. The legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates. *Stone* v. *Farmers' Loan & Trust Company*, 116 U. S. 307; *Chicago, Milwaukee &c. Railway* v. *Minnesota*, 134 U. S. 418.

The Supreme Court of Michigan in passing upon the present case, felt constrained to make this observation:

"It being evident from the record that this was a friendly suit between the plaintiff and the defendant to test the constitutionality of this legislation, the attorney general, when it was brought into this court upon writ of error, very properly interposed and secured counsel to represent the public interest. In the stipulation of facts or in the taking of testimony in the court below neither the attorney general nor any other person interested for or employed in behalf of the people of the State took any part. What difference there might have been in the record had the people been represented in the court below, however, under our view of the case, is not of material inquiry."

Counsel for plaintiff in error, referring to this, does not question or deny, but says: "The attorney general speaks of the case as evidently a friendly case, and Justice Morse, in his opinion, also so speaks of it. This may be conceded; but what of it? There is no ground for the claim that any fraud or trickery has been practised in presenting the testimony."

We think there is much in the suggestion. The theory upon which, apparently, this suit was brought is that parties

have an appeal from the legislature to the courts; and that the latter are given an immediate and general supervision of the constitutionality of the acts of the former. Such is not true. Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, State or Federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.

These observations are pertinent here. On the very day the act went into force the application for a ticket is made, a suit commenced, and within two months a judgment obtained in the trial court; a judgment rendered not upon the presentation of all the facts from the lips of witnesses, and a full inquiry into them, but upon an agreed statement which precludes inquiry into many things which necessarily largely enter into the determination of the matter in controversy. A single suggestion in this direction: It is agreed that the defendant's operating expenses for 1888 were $2,404,516.54. Of what do these operating expenses consist? Are they made up partially of extravagant salaries; fifty to one hundred thousand dollars to the president, and in like proportion to subordinate officers? Surely, before the courts are called upon to adjudge an act of the legislature fixing the maximum passenger rates for railroad companies to be unconstitutional, on the ground that its enforcement would prevent the stockholders from receiving any dividends on their investments, or the bondholders any interest on their loans, they should be fully advised as to what is done with the receipts and earnings of the company; for if so advised, it might clearly appear that a

prudent and honest management would, within the rates prescribed, secure to the bondholders their interest, and to the stockholders reasonable dividends. While the protection of vested rights of property is a supreme duty of the courts, it has not come to this, that the legislative power rests subservient to the discretion of any railroad corporation which may, by exorbitant and unreasonable salaries, or in some other improper way, transfer its earnings into what it is pleased to call "operating expenses."

We do not mean to insinuate aught against the actual management of the affairs of this company. The silence of the record gives us no information, and we have no knowledge outside thereof, and no suspicion of wrong. Our suggestion is only to indicate how easily courts may be misled into doing grievous wrong to the public, and how careful they should be to not declare legislative acts unconstitutional upon agreed and general statements, and without the fullest disclosure of all material facts.

Judgment affirmed.

BRIGGS *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 722. Submitted January 4, 1892. — Decided February 29, 1892.

During the civil war two citizens of the United States, residing in loyal States could make a valid contract for the sale or mortgage of cotton growing on a plantation within one of the insurgent States, and such a contract would pass existing cotton on the plantation, and also crops to be subsequently raised thereon.

In Kentucky the common law rule prevails that a sale of personal property is complete, and title passes as between vendor and vendee, when the terms of transfer are agreed upon, without actual delivery.

The contract in this case for the sale of cotton growing and to be grown did not come within the statute of frauds, and the only question to be decided is whether it was a contract of sale or a contract of mortgage.

The captured and abandoned property act was a surrender by the United States of its right as a belligerent to appropriate property of a particular kind taken in the enemy's country, and belonging to a loyal citizen.

THE court stated the case as follows:

Statement of the Case.

This is an appeal from a decree of the Court of Claims, dismissing the petition of the appellant, praying judgment for the amount of the proceeds of certain cotton, the property of his testator, which was seized by the forces of the United States and sold and the proceeds paid into the Treasury. The facts of the case, briefly stated, are as follows:

Charles S. Morehead was a citizen of Kentucky at the breaking out of the late civil war. He was a man of distinction in that State, and had once been its governor. He was a lawyer by profession, and before and until the war practised law in partnership with C. M. Briggs. In the spring of 1861 he was the owner of two plantations near Egg's Point, in Mississippi, and at the opening of the war he was on the plantations; but some time in the following May or June, when a prolonged struggle seemed inevitable, he left one of the plantations in charge of an overseer and the other in charge of his son, and returned to Kentucky. Not long afterwards he was arrested and confined in Fort Warren as a suspected rebel, because of his sympathy with the Confederate cause, but, upon taking the oath of allegiance to the United States, he was, in February, 1862, released. On the 18th of April following he sold to C. M. Briggs, his former partner, by a bill of sale in writing, all the cotton on his plantations, baled and unbaled, gathered and ungathered, and all that should be raised in 1862, to satisfy certain indebtedness to him and to secure him for certain debts which he was under obligation to pay for Morehead. The bill of sale was as follows:

"For and in consideration of money loaned and advanced heretofore by C. M. Briggs, and further valuable considerations by way of suretyship for me by said Briggs, I hereby sell and transfer to said C. M. Briggs all the cotton on my two plantations in Mississippi, near Egg's Point and Greenville. Said cotton so sold embraces all that I may have, baled and unbaled, gathered and ungathered. This is intended to cover all cotton that I have now or may have this year on said two plantations, supposed to be about two thousand bales.

"April 18, 1862. C. S. Morehead."

The bill of sale was delivered to C. M. Briggs on the day of its execution, and at the time both parties were citizens and residents of Kentucky.

The agents left in charge of the plantations in Mississippi superintended the raising of cotton on them, and had general direction of the affairs of the plantations in the years 1861, 1862 and 1863. The son of Morehead sold some of the cotton in order to obtain money to carry on the plantations, and some of the sales were made to an agent of the Confederate government; but it does not appear that Morehead gave any directions to his agents as to the disposition of any of the cotton, or had any communication with them in 1862 or 1863.

None of the cotton belonging to Morehead which was on the plantations at the time of the sale to Briggs came into the possession of the United States; all that came into their possession was raised subsequently. In 1862, after the sale, the agents left in charge of the plantations raised a crop of cotton, a portion of which, in December, 1862, or in January, 1863, was hauled to Wilson's Burn, a place then used for the storage of cotton belonging to, or intended to be sold to, the Confederate government, and also for the storage of the cotton of individuals. The cotton was marked by the agents, "C. S. A.," in order to save it from destruction by Confederate soldiers, but it was not so marked by direction of Morehead.

Whilst the cotton was there three hundred and eighty bales of it were, in March, 1863, taken by Captain Osband of the Fourth Illinois Cavalry, acting under orders of General Grant, to Worthington's Landing on the Mississippi River, where it was intermingled with other cotton from adjacent plantations, and shipped to Memphis, Tennessee, and there turned over to Captain Fort, Assistant Quartermaster General of the United States Army. The whole amount of cotton received by him was twenty-one hundred and thirty bales, which, after being rebaled and thereby reduced to twenty-one hundred and eleven bales, was sold by him, and the proceeds accounted for to the United States, amounting to $422,125.70. The cotton, including the three hundred and eighty bales mentioned above, which came from the plantations of Morehead, amounted to

four hundred and fifty-five bales, and their proportional part of the proceeds was $91,000. There is a discrepancy between this amount and that which is subsequently claimed in the amended petition. There is also a discrepancy between the number of bales stated in the findings to have been received by the Quartermaster General and the number mentioned in the act of Congress of June 4, 1888. But these discrepancies are slight, and do not affect the questions considered.

The exact state of the indebtedness from Morehead to Briggs, at the time of the execution of the bill of sale, does not appear. Briggs had paid eight or ten thousand dollars for Morehead, and the latter had collected Briggs's portion of a fee amounting to five thousand dollars, and was in the habit of borrowing money from him during the continuance of their law partnership, until the commencement of the war. It does not appear that any definite settlement was had between them. C. M. Briggs having died, his brother, James A. Briggs, was on the 15th of July, 1875, appointed executor of his estate by the county court of Jefferson County, in Kentucky, of which county the deceased was at the time of his death a citizen and resident. He accepted the trust and qualified by taking the necessary oath and executing the required bond.

By a special act of Congress, passed on the 4th of June, 1888, (25 Stat. 1075, c. 348,) the Court of Claims was given, subject to certain conditions hereafter named, like jurisdiction to hear and determine the claim of the legal representatives of C. M. Briggs for the proceeds of four hundred and fifty-five bales of cotton, stated in the act to be then in the Treasury of the United States, and alleged to have been owned in whole or in part by the deceased, as was given to that court by the acts of March 12, 1863, and July 2, 1864, upon petition to be filed in that court within two years from the passage of the act, notwithstanding any statute of limitations to the contrary. One of the conditions named was that on a preliminary inquiry the court should find that Briggs was in fact loyal to the United States government, and that the assignment to him from Morehead was *bona fide;* the sale from Morehead being thus designated in the act. A further con-

dition was, that if the court should find that the alleged assignment from Morehead to Briggs, under which Briggs claimed the cotton, was intended only as security for indebtedness and against contingent liabilities assumed for Morehead, then judgment should be rendered for such portion of the proceeds of the said cotton as would satisfy the debts and claims. It was also provided that the judgment should not be paid out of the general fund in the Treasury arising from the sale of captured and abandoned property, but should be paid out of the special fund charged to and accounted for by Captain Fort, Assistant Quartermaster, arising from the sale of the twenty-two hundred and nine bales of cotton received by him, with which claimant's cotton was intermingled; the claimant to receive only the proportionate part which his cotton might bear to the net proceeds accounted for by Captain Fort.

The executor accordingly filed his petition, in which, as amended, he alleges that, of the net proceeds of the cotton accounted for by Captain Fort, there remains in the Treasury, after deducting the payments properly chargeable to the same, and which have been paid out to various claimants on judgments of the Court of Claims, the sum of $138,523.92, being the net proceeds of six hundred and twenty-one bales of cotton, for which no claim has ever been made on which judgment has been rendered, or payment obtained from the Treasury. And the petitioner alleges that of this sum he is entitled to recover his pro rata share, corresponding to his four hundred and fifty-five bales, amounting in the aggregate to $101,794.57, for which he prays judgment.

A preliminary inquiry was had by the Court of Claims as to the loyalty of the testator, C. M. Briggs, during the war, and as to the *bona fide* character of the assignment to him by Morehead; and it was found that the testator was in fact loyal to the United States government, and that the assignment to him by Morehead of April 18, 1862, was *bona fide*.

The case being thus freed from these preliminary inquiries, the only questions remaining for consideration were, first, the effect of that assignment in passing title to the cotton raised

on the plantations and seized by the forces of the United States and sold; second, the right of the owner or assignee to the proceeds received, he being loyal to the government of the United States during the war; and, third, the amount of the claims of the deceased against Morehead payable out of such proceeds.

The court held that cotton raised in the Confederate States during the war was hostile property which the United States had the right to and did apply to their own uses while it continued; that the fact that the owner or assignee of the cotton was a loyal man during the war did not affect the right of the United States to thus apply it, or the proceeds of its sale, to their own use; and that therefore no liability rested upon the government of the United States to account for the property, or its proceeds when sold, to the owner or assignee. The petition was accordingly dismissed, (25 C. Cl. 126,) and from the decree of dismissal the case is brought to this court on appeal.

Mr. Philip B. Thompson, Jr., and *Mr. W. J. Moberley* for appellant.

Mr. Assistant Attorney General Maury for appellee.

Mr. Justice Field, having stated the case, delivered the opinion of the court.

Though at the time the sale, or assignment, as it is termed in the act of Congress, was made of the cotton on the plantations in Mississippi, or to be raised thereon during the year 1862, the late civil war was flagrant, there was no rule of law arising from the existence of hostilities between the different sections of the country which in any respect impaired the validity of the transaction. Both parties were then residents and citizens of Kentucky, and no agreement was made for the transportation and delivery of the cotton across the lines separating the insurrectionary States from those which maintained their loyalty and adhered to the Union. Morehead, the owner, was in the spring of 1861, at the commencement

of the war, on the plantations in Mississippi; and in May or June following, when a prolonged struggle seemed inevitable, he placed one of them in charge of his son and the other in charge of an overseer, and returned to Kentucky. It does not appear that ever afterwards during the continuance of the war he had any communication with either. They superintended the plantations, and in 1862 raised a crop of cotton thereon, the greater part of which, if not the whole, was afterwards seized by the forces of the United States, placed in the custody of an assistant quartermaster of the army, sold by him, and the proceeds paid over or accounted for to the Treasury of the United States.

In *Conrad* v. *Waples*, 96 U. S. 279, 286, we said of a sale of real property within the Confederacy between two persons residents there during the war:

"The character of the parties as rebels or enemies did not deprive them of the right to contract with and to sell to each other. As between themselves, all the ordinary business between people of the same community in buying, selling and exchanging property, movable and immovable, could be lawfully carried on, except in cases where it was expressly forbidden by the United States, or where it would have been inconsistent with or have tended to weaken their authority. It was commercial intercourse and correspondence between citizens of one belligerent and those of the other, the engaging in traffic between them, which were forbidden by the laws of war and by the President's proclamation of non-intercourse. So long as the war existed, all intercourse between them inconsistent with actual hostilities was unlawful. But commercial intercourse and correspondence of the citizens of the enemy's country among themselves were neither forbidden nor interfered with, so long as they did not impair or tend to impair the supremacy of the national authority or the rights of loyal citizens. No people could long exist without exchanging commodities, and, of course, without buying, selling and contracting. And no belligerent has ever been so imperious and arbitrary as to attempt to forbid the transaction of ordinary business by its enemies among themselves.

No principle of public law and no consideration of public policy could be subserved by any edict to that effect; and its enforcement, if made, would be impossible."

The property in this case was real estate, but we do not perceive how that fact would alter the validity of a transaction, if it could be affected by the character of the parties. If residents of the enemy's country may contract for property situated within it, there would seem to be no objection to similar transactions by persons residing outside of the Confederate lines and adhering to the national government, so long as no intercourse or connection is kept up with the inhabitants of the enemy's country. As stated in the case from which we have cited, it was commercial intercourse and correspondence between citizens of one belligerent and the other, and the engagement in traffic between them, leading to the transmission of money or property from one belligerent country to the other, which was forbidden.

There was, therefore, nothing in the sale of the cotton on the plantations, or of cotton to be raised thereon, there being no agreement respecting its movement across the border of the contending sections, which brought the transaction within the prohibitions of any rule of international law or the proclamations of the President of the United States in 1861. (12 Stat. 257, 1262; 13 Stat. 731.)

Those who may desire to examine the decisions of the courts as to the nature and extent of the prohibitions upon transactions between subjects of countries at war, or between subjects of the same country respecting property situated in the enemy's country, will find in the opinion of the Supreme Judicial Court of Massachusetts, in *Kershaw* v. *Kelsey*, 100 Mass. 561, the subject ably and exhaustively considered, with an analysis of the most important decisions of the English and American courts.

The sale not being open to objection as relating to property within the hostile territory, the question arises whether it was sufficient to pass the existing cotton on the plantations and crops to be subsequently raised thereon; and on that question we have no doubt. The crop which was afterward seized by

the forces of the United States was not then in existence, but from the fact that it was raised during the year we conclude it was already planted; though if otherwise, the fact would not be material. The sale would take effect the moment the crop appeared. In *Butt* v. *Ellett*, 19 Wall. 544, the question was as to the effect of an instrument purporting to be a mortgage of a crop, the seed of which had not been sown. A plantation in Mississippi was leased for one year for $3500, for which the lessee gave his note, and to secure it embodied in the lease a mortgage of all the crops raised on the plantations during a certain designated year. It was held that the mortgage clause could not operate as a mortgage, because the crops to which it related were not in existence, but that when they grew the lien attached and bound them effectually from that time.

In *Andrew* v. *Newcomb*, 32 N. Y. 417, 421, the Court of Appeals of New York held that in the case of crops to be sown, the title vests potentially from the time of the bargain, and actually as soon as the subject arises. The court cited several cases, going back as far as the time of Chief Justice Hobart, to sustain this doctrine, observing that they sufficiently showed that crops to be raised were an exception to the general rule that title to property not in existence cannot be affected so as to vest the title when it comes into being.

The delivery of the crops was not essential to pass the title as between Morehead and Briggs. The law on the subject of the sale of personal property does not require impossibilities, as would be a delivery in a case of that kind. The cotton was not at the time grown, and even if the sale be deemed incomplete until the actual appearance of the crop, it could not then be removed from the soil for delivery; besides, it was within the limits of a recognized enemy's country, and any attempt to transport it to the Union side for delivery would have been unlawful.

By the common law a sale of personal property is complete and the title passes as between vendor and vendee when the terms of transfer are agreed upon, without actual delivery.

In *Simmons* v. *Swift*, 5 B. & C. 857, 862, it was so held by

the Court of King's Bench, Justice Bailey using this language: "Generally speaking, where a bargain is made for the purchase of goods, and nothing is said about payment or delivery, the property passes immediately, so as to cast upon the purchaser all future risk, if nothing further remains to be done to the goods, although he cannot take them away without paying the price."

In *Gilmour* v. *Supple*, 11 Moore P. C. 551, 566, the Privy Council, in giving its judgment, said: "By the law of England, by a contract for the sale of specific ascertained goods, the property immediately vests in the buyer, and a right to the price in the seller, unless it can be shown that such was not the intention of the parties."

In Kentucky, where the sale in this case was made, the common law rule prevails. In *Willis* v. *Willis*, 6 Dana, 48, the Court of Appeals of that State said: "So soon as a bargain of sale of personal goods is struck the contract becomes absolute without actual payment or delivery, and the property and risk of accident to the goods vest in the buyer."

Nor was the sale void within the statute of frauds. There was no creditor or purchaser who could question the transfer of title to the vendee. The government stood in no such relation and could raise no such objection. It had no preëxisting demand or equity against the property. All the rights of the government resulted from capture.

And this brings us to the consideration of the most important question in the case: Whether the United States acquired title to the property by its capture, and can, therefore, disregard the claim of ownership by the testator or petitioner, and treat the cotton as property confiscated to their use. The Court of Claims held that the United States rightfully appropriated the property and its proceeds, and were not under any obligation to account for them to the owner or his representative.

It proceeded upon the doctrine that the Confederate States and the States which adhered to the Union were engaged in a civil war, having such proportions as to be attended with the incidents of an international war, and that therefore the United

States could treat all property within the Confederate lines as enemy's property, and in the exercise of their belligerent rights seize and appropriate to their own use any of it which could be of service to them in the prosecution of the war; and that the property which was most beneficial to the Confederacy in furnishing funds was cotton, and it was for that reason particularly sought by the national forces for capture. The Court of Claims recognized the doctrine, also, that the right of capture extended to the products of the soil, whether owned by citizens of the Confederacy or strangers to both belligerents, and that the capture of movable property within the Confederacy transferred the title when reduced to firm possession; and it therefore held that when the cotton for the proceeds of which this action is brought was captured by the national forces and sold and the proceeds paid into the treasury of the United States, the title to the property and proceeds passed absolutely to the general government.

This decision of the Court of Claims would have been correct, and been sustained, had the government of the United States confined its action simply to the enforcement of its rightful powers as a belligerent, and had not surrendered its rights as a belligerent to appropriate property of a particular kind taken in the enemy's country, belonging to a loyal citizen.

In *Brown* v. *United States*, 8 Cranch, 110, 122, 123, the court said that it was conceded that war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, and observed that the mitigations of this rigid rule, which the humane and wise policy of modern times had introduced into practice, might more or less affect the exercise of this right, but could not impair the right itself.

Substantially the same thing was said in *Young* v. *United States*, 97 U. S. 39, 60: "All property," was the language of the court in that case, "within enemy territory is in law enemy property, just as all persons in the same territory are enemies. A neutral, owning property within the enemy's lines, holds it as enemy property, subject to the laws of war; and, if it is hostile property, subject to capture."

But in another case, that of *Mrs. Alexander's Cotton*, 2 Wall. 404, 419, this court said that "this rule, as to property on land, has received very important qualifications from usage, from the reasonings of enlightened publicists, and from judicial decisions. It may now be regarded as substantially restricted 'to special cases dictated by the necessary operation of the war,' and as excluding, in general, 'the seizure of the private property of pacific persons for the sake of gain.'"

The circumstances in which the late war originated, and the fact that within the Confederate lines there were multitudes of people who were sincerely attached to the government of the Union and desired its success, gave ample reason to the Federal government for a modification of the harsh rules of war in regard to the capture of property on land, so as not to bring within the same calamity friend and foe. It was a desire to ameliorate as much as possible the exercise of the necessary belligerent right of capture of property within the rebel lines, in its application to the property of persons thus friendly to the Union, so far as cotton was concerned, which led to the passage of the Captured and Abandoned Property Act of March, 1863, and the subsequent amendments thereto.

Cotton was considered the great means of procuring supplies for the Confederate government. It is well known to have been its chief reliance for the purchase of arms and other munitions of war abroad; indeed, without this resource, the Confederacy would have been deprived of its greatest means of obtaining the necessary supplies to continue the struggle. As said by this court in the case of *Mrs. Alexander's Cotton*, 2 Wall. 420, cited above, no principle of equity or just policy required, when the national occupation was itself precarious, that it should be spared from capture and allowed to remain, in case of the withdrawal of the Union troops, an element of strength to the rebellion.

The act of Congress of March 12, 1863, providing for the collection of abandoned and captured property in the insurrectionary territory, (12 Stat. 820, c. 120,) declared that all such property might be appropriated to the public use or sold. But it also said, in substance, that the property of friend and foe

cannot at the time be separated; and all the property of that kind found within the Confederate lines will be taken, sold, and when sold its proceeds will be deposited in the Treasury; but if afterwards within two years after the suppression of the rebellion the owner can establish to the satisfaction of the Court of Claims his title to the property thus taken, and his loyalty to the Union cause, then the portion of the proceeds belonging to him shall be restored, after deducting the expenses attendant upon its capture, removal and custody. *United States* v. *Anderson*, 9 Wall. 56, 67.

Under this act immense amounts of property belonging to citizens of the United States, who sincerely mourned the origin of the Confederacy, and longed for the re-establishment of the national government, and who kept faith in their hearts through the whole of the long struggle, were accounted for and the proceeds restored to the rightful owners; and certainly it must be regarded as a most beneficent act on the part of the general government. The records of the Court of Claims show a multitude of cases where this law has been administered, and many loyal people have had the proceeds of their property returned to them, which had been captured because of the fact that it was situated within hostile territory.

In the present case, the petitioner was allowed the same right to present his claim for the proceeds of the property belonging to his testator which would have been allowed if the testator himself had presented his claim within two years after the capture. The question was as to the loyalty of the testator of the claimant, and also as to his ownership of the cotton. His loyalty was found by the court, and also the *bona fides* of the sale of the property. After these facts had been established the only question that could have been properly considered was the amount of the proceeds which the petitioner should receive. That was not considered by the Court of Claims.

In passing the act, Congress considered that a question might arise whether the transaction between Morehead and Briggs constituted a sale, or an assignment by way of mortgage, although it purports to be a sale and transfer. The act pro-

vides that if the transaction was intended only as security for indebtedness and against contingent liabilities, only such portion of the proceeds should be awarded to the petitioner as would satisfy the debts and claims of the testator, to secure which the assignment, as it is termed in the act, was made.

The case, therefore, will be

Reversed, and sent back to the Court of Claims, with instructions to pass upon the question whether the transaction was an absolute sale or merely a mortgage or pledge; and according to the view adopted the amount of the proceeds due and payable to the petitioner should be ascertained, and it is so ordered.

NEBRASKA v. IOWA.

ORIGINAL.

No. 4. Original. Argued January 29, 1892. — Decided February 29, 1892.

When grants of land border on running water, and the banks are changed by the gradual process known as accretion, the riparian owner's boundary line still remains the stream; but when the boundary stream suddenly abandons its old bed and seeks a new course by the process known as avulsion, the boundary remains as it was, in the centre of the old channel: and this rule applies to a State when a river forms one of its boundary lines.

The law of accretion controls on the Missouri River, as elsewhere; but the change in the course of that river in 1877 between Omaha and Council Bluffs does not come within the law of accretion, but within that of avulsion.

THE court stated the case as follows:

This is an original suit brought in this court by the State of Nebraska against the State of Iowa, the object of which is to have the boundary line between the two States determined. Iowa was admitted into the Union in 1846, and its western boundary as defined by the act of admission was the middle of the main channel of the Missouri River. Nebraska was ad-

cannot at the time be separated; and all the property of that kind found within the Confederate lines will be taken, sold, and when sold its proceeds will be deposited in the Treasury; but if afterwards within two years after the suppression of the rebellion the owner can establish to the satisfaction of the Court of Claims his title to the property thus taken, and his loyalty to the Union cause, then the portion of the proceeds belonging to him shall be restored, after deducting the expenses attendant upon its capture, removal and custody. *United States* v. *Anderson*, 9 Wall. 56, 67.

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mitted in 1867, and its eastern boundary was likewise the middle of the channel of the Missouri River. Between 1851 and 1877, in the vicinity of Omaha, there were marked changes in the course of this channel, so that in the latter year it occupied a very different bed from that through which it flowed in the former year. Out of these changes has come this litigation, the respective States claiming jurisdiction over the same tract of land. To the bill filed by the State of Nebraska the State of Iowa answered, alleging that this disputed ground was part of its territory, and also filed a cross-bill, praying affirmative relief, establishing its jurisdiction thereof, to which cross-bill the State of Nebraska answered. Replications were duly filed and proofs taken.

Mr. J. M. Woolworth for the State of Nebraska. *Mr. C. J. Greene* and the *Attorney General* of that State were with him on the brief, in which were cited *Jefferis* v. *East Omaha Land Co.*, 134 U. S. 178; 8 Opinions Attorneys General, 177; *Indiana* v. *Kentucky*, 136 U. S. 479.

Mr. Smith McPherson for the State of Iowa. The *Attorney General* of that State and *Mr. J. J. Stewart* were with him on the brief, in which were cited *St. Louis* v. *Rutz*, 138 U. S. 226; *Mulry* v. *Norton*, 100 N. Y. 424.

Mr. Justice Brewer delivered the opinion of the court.

It is settled law, that when grants of land border on running water, and the banks are changed by that gradual process known as accretion, the riparian owner's boundary line still remains the stream, although, during the years, by this accretion, the actual area of his possessions may vary. In *New Orleans* v. *United States*, 10 Pet. 662, 717, this court said: "The question is well settled at common law, that the person whose land is bounded by a stream of water which changes its course gradually by alluvial formations, shall still hold by the same boundary, including the accumulated soil. No other rule can be applied on just principles. Every pro-

prietor whose land is thus bounded is subject to loss by the same means which may add to his territory; and, as he is without remedy for his loss in this way, he cannot be held accountable for his gain." (See also *Jones* v. *Soulard*, 24 How. 41; *Banks* v. *Ogden*, 2 Wall. 57; *Saulet* v. *Shepherd*, 4 Wall. 502; *St. Clair County* v. *Lovingston*, 23 Wall. 46; *Jefferis* v. *East Omaha Land Co.*, 134 U. S. 178.)

It is equally well settled, that where a stream, which is a boundary, from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary; and that the boundary remains as it was, in the centre of the old channel, although no water may be flowing therein. This sudden and rapid change of channel is termed, in the law, avulsion. In Gould on Waters, sec. 159, it is said: "But if the change is violent and visible, and arises from a known cause, such as a freshet, or a cut through which a new channel is formed, the original thread of the stream continues to mark the limits of the two estates." 2 Bl. Com. 262; Angell on Water Courses, § 60; *Trustees of Hopkins' Academy* v. *Dickinson*, 9 Cush. 544; *Buttenuth* v. *St. Louis Bridge Co.*, 123 Illinois, 535; *Hagan* v. *Campbell*, 8 Porter (Ala.) 9; *Murry* v. *Sermon*, 1 Hawks (N. C.) 56.

These propositions, which are universally recognized as correct where the boundaries of private property touch on streams, are in like manner recognized where the boundaries between States or nations are, by prescription or treaty, found in running water. Accretion, no matter to which side it adds ground, leaves the boundary still the centre of the channel. Avulsion has no effect on boundary, but leaves it in the centre of the old channel. In volume 8, Opinions of Attorneys General, 175, 177, this matter received exhaustive consideration. A dispute arose between our government and Mexico, in consequence of changes in the Rio Bravo. The matter having been referred to Attorney General Cushing, he replied at length. We quote largely from that opinion. After stating the case, he proceeds:

"With such conditions, whatever changes happen to either bank of the river by accretion on the one or degradation of the other, that is, by the gradual, and, as it were, insensible

accession or abstraction of mere particles, the river as it runs continues to be the boundary. One country may, in process of time, lose a little of its territory, and the other gain a little, but the territorial relations cannot be reversed by such imperceptible mutations in the course of the river. The general aspect of things remains unchanged. And the convenience of allowing the river to retain its previous function, notwithstanding such insensible changes in its course, or in either of its banks, outweighs the inconveniences, even to the injured party, involved in a detriment, which, happening gradually, is inappreciable in the successive moments of its progression.

"But, on the other hand, if, deserting its original bed, the river forces for itself a new channel in another direction, then the nation, through whose territory the river thus breaks its way, suffers injury by the loss of territory greater than the benefit of retaining the natural river boundary, and that boundary remains in the middle of the deserted river bed. For, in truth, just as a stone pillar constitutes a boundary, not because it is a stone, but because of the place in which it stands, so a river is made the limit of nations, not because it is running water bearing a certain geographical name, but because it is water flowing in a given channel, and within given banks, which are the real international boundary.

"Such is the received rule of the law of nations on this point, as laid down by all the writers of authority. (See ex. gr. Puffend. Jus. Nat. lib. iv, cap. 7, s. ii; Gundling, Jus. Nat. p. 248; Wolff, Jus. Gentium, s. 106–109; Vattel, Droit des Gens, liv. i, chap. 22, s. 268, 270; Stypmanni, Jus. Marit. cap. v. n. 476–552; Rayneval, Droit de la Nature, tom. i, p. 307; Merlin, Répertoire, ss. voc. alluv.)"

Further reference is made in the opinion to the following authorities:

"Don Antonio Riquelme states the doctrine as follows:

"'When a river changes its course, directing its currents through the territory of one of the two coterminous States, the bed which it leaves dry remains the property of the State (or States) to which the river belonged, that being retained as the limit between the two nations, and the river enters so far

into the exclusive dominion of the nation through whose territory it takes the new course. Nations must, of necessity, submit their rights to these great alterations which nature predisposes and consummates. . . . But, when the change is not total, but progressive only, that is to say, when the river does not abandon either State, but only gradually shifts its course by accretions, then it continues still to be the boundary, and the augmentation of territory, which one country gains at the expense of the other, is to be held by it as a new acquisition of property.' (Derecho Internacional, tom. i, p. 83.)

"Don Andres Bello and Don José Maria de Pando both enunciate the doctrine in exactly the same words, namely:

"'When a river or lake divides two territories, whether it belong in common to the conterminous riparian States, or they possess it by halves, or one of them occupies it exclusively, the rights, which either has in the lake or river, do not undergo any change by reason of alluvion. The lands insensibly invaded by the water are lost by one of the riparian States, and those which the water abandons on the opposite bank increase the domain of the other State. But if, by any natural accident, the water, which separated the two States, enters of a sudden into the territory of the other, it will thenceforth belong to the State whose soil it occupies, and the land, including the abandoned river-channel or bed, will incur no change of master.' (Bello, Derecho Internacional, p. 38; Pando, Derecho Internacional, p. 99.)

"Almeda refers to the same point, briefly, but in decisive terms. He says:

"'As the river belongs to the two nations, so, also, the river-bed, if by chance it become dry, is divided between them as proprietors. When the river changes its course, throwing itself on one of two conterminous states, it then comes to belong to the state through whose territory it runs, all community of right in it so far ceasing.' Derecho Publico, tom. i. p. 199.

"Leaving authorities of this class, then, let us come to those which discuss the question in its relation to private rights, and as a doctrine of municipal jurisprudence.

"The doctrine is transmitted to us from the laws of Rome. (Justinian, Inst. lib. ii, tit. i, s. 20–24; Dig. lib. xii, tit. i, l. 7. See J. Voet ad Pandect. tom. i, p. 606, 607. Heinec. Recit. lib. ii, tit. 2, s. 358–369; Struvii Syntag. ex. 41, c. 33–25; Bowyers's Civil Law, ch. 14.)

"Don Alfonso transferred it from the civil law to the Partidas. (Partida iii, tit. 28, l. 31.) Thus it came to be, as it still remains, an established element of the laws of Spain and of Mexico. (Alvarez, Instituciones, lib. ii, tit. i, s. 6; Asso, Instituciones, p. 101; Gomez de la Serna, Elementos, lib. ii, tit. 4, sec 3, no. 2; Escriche, Dic. s. vocc. accession natural, alluvion, avulsion; Febrero Mexicano, tom. 1, p. 161; Sala Mexicano, ed. 1845, tom. ii, p. 62.)

"The same doctrine, starting from the same point of departure, made its way through the channel of Bracton, into the laws of England, and thence to the United States. (Bracton de Legg. Angliae, lib. 2, cap. 2, fol. 9; Blacks. Comm. vol. ii, p. 262; Woolrych on Waters, p. 34; Angell on Water Courses, ch. 2; *Lynch* v. *Allen*, 4 De. & Bat. N. C. R. p. 62; *Murry* v. *Sermon*, 1 Hawks, N. C. R. p. 56; *The King* v. *Lord Scarborough*, 3 B. & C. p. 91; S. C. 2 Bligh, N. S. p. 147.

"Such, beyond all possible controversy, is the public law of modern Europe and America, and such, also, is the municipal law both of the Mexican Republic and the United States."

Vattel states the rule thus (Book 1, c. 22, secs. 268, 269, 270)[1]:

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[1] § 268. Du droit d'alluvion.

Si le territoire qui aboutit à un fleuve limitrophe n'a point d'autres limites que le fleuve même, il est au nombre des territoires à limites naturelles, ou indéterminés (*territoria arcifinia*), et il jouit du droit; c'est-à-dire que les atterrissements qui peuvent s'y former peu à peu par le cours du fleuve, les accroissements insensibles, font des accroissements de ce territoire, qui en suivent la condition et appartiennent au même maître. Car si je m'empare d'un terrain en déclarant que je veux pour limites le fleuve qui le baigne, ou s'il m'est donné sur ce pied-là, j'occupe par celà même d'avance le droit *d'alluvion*, et, par conséquent, je puis seul m'approprier tout ce que le courant de l'eau ajoutera insensiblement à mon terrain. Je dis *insensiblement*, parce que dans le cas très-rare que l'on nomme *avulsion*, lorsque la violence de l'eau détache une portion considérable d'un fonds et la joint à une autre,

"If a territory which terminates on a river has no other boundary than that river, it is one of those territories that have natural or indeterminate bounds (*territoria arcifinia*), and it enjoys the right of alluvion; that is to say, every gradual increase of soil, every addition which the current of the river may make to its bank on that side, is an addition to that territory, stands in the same predicament with it, and belongs to the same owner. For, if I take possession of a piece of land, declaring that I will have for its boundary the river which washes its side — or if it is given to me upon that footing, I thus acquired beforehand the right of alluvion; and, consequently, I alone may appropriate to myself whatever additions the current of the river may insensibly make to my

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en sorte qu'elle est encore reconnaissable, cette pièce de terre demeure naturellement à son premier maître. De particulier à particulier, les lois civiles ont prévu et décidé le cas; ils doivent combiner l'équité avec le bien de l'État et le soin de prévenir les procès.

En cas de doute, tout territoire aboutissant à un fleuve est présumé n'avoir d'autres limites que le fleuve même, parce que rien n'est plus naturel que de le prendre pour bornes, quand on s'établit sur ses bords; et dans le doute, on présume toujours ce qui est plus naturel et plus profitable.

§ 269. Si l'alluvion apporte quelque changement aux droits sur le fleuve.

Dès qu'il est établi qu'un fleuve fait la séparation de deux territoires, soit qu'il demeure commun aux deux riverains opposés, soit qu'ils le partagent par moitié, soit enfin qu'il appartienne tout entier à l'un des deux, les divers droits sur le fleuve ne souffrent aucun changement par l'alluvion. S'il arrive donc que, par un effet naturel du courant, l'un des deux territoires reçoive de l'accroissement, tandis que le fleuve gagne peu à peu sur la rive opposée, le fleuve demeure la borne naturelle des deux territoires, et chacun y conserve ses mêmes droits, malgré son déplacement successif; en sorte, par exemple, que s'il est partagé par le milieu entre les deux riverains, ce milieu, quoiqu'il ait changé de place, continuera à être la ligne de séparation des deux voisins. L'un perd, il est vrai, tandis que l'autre gagne; mais la nature seule fait ce changement: elle détruit le terrain de l'un, pendant qu'elle en forme un nouveau pour l'autre. La chose ne peut pas être autrement dès qu'on a pris le fleuve seul pour limites.

§ 270. De ce qui arrive quand le fleuve change son cours.

Mais si, au lieu d'un déplacement successif, le fleuve, par un accident purement naturel, se détourne entièrement de son cours, et se jette dans l'un des deux États voisins, le lit qu'il abandonne reste alors pour limites; il demeure au maître du fleuve (§ 267). Le fleuve périt dans toute cette partie, tandis qu'il naît dans son nouveau lit, et qu'il y naît uniquement pour l'État dans lequel il coule.

land. I say 'insensibly,' because, in the very uncommon case called avulsion, when the violence of the stream separates a considerable part from one piece of land and joins it to another, but in such manner that it can still be identified, the property of the soil so removed naturally continues vested in its former owner. The civil laws have thus provided against and decided this case, when it happens between individual and individual; they ought to unite equity with the welfare of the state, and the care of preventing litigations.

"In case of doubt, every territory terminating on a river is presumed to have no other boundary than the river itself; because nothing is more natural than to take a river for a boundary, when a settlement is made; and wherever there is a doubt, that is always to be presumed which is most natural and most probable.

"As soon as it is determined that a river constitutes the boundary line between two territories, whether it remains common to the inhabitants on each of its banks, or whether each shares half of it, or, finally, whether it belongs entirely to one of them, their rights, with respect to the river, are in nowise changed by the alluvion. If, therefore, it happens that, by a natural effect of the current, one of the two territories receives an increase, while the river gradually encroaches on the opposite bank, the river still remains the natural boundary of the two territories, and, notwithstanding the progressive changes in its course, each retains over it the same rights which it possessed before; so that, if, for instance, it be divided in the middle between the owners of the opposite banks, that middle, though it changes its place, will continue to be the line of separation between the two neighbors. The one loses, it is true, while the other gains; but nature alone produces this change; she destroys the land of the one, while she forms new land for the other. The case cannot be otherwise determined, since they have taken the river alone for their limits.

"But if, instead of a gradual and progressive change of its bed, the river, by an accident merely natural, turns entirely out of its course and runs into one of the two neighboring

States, the bed which it has abandoned becomes thenceforward their boundary, and remains the property of the former owner of the river, (sec. 267,) the river itself is, as it were, annihilated in all that part while it is reproduced in its new bed, and there belongs only to the State in which it flows."

The result of these authorities puts it beyond doubt that accretion on an ordinary river would leave the boundary between two States the varying centre of the channel, and that avulsion would establish a fixed boundary, to wit: the centre of the abandoned channel. It is contended, however, that the doctrine of accretion has no application to the Missouri River, on account of the rapid and great changes constantly going on in respect to its banks; but the contrary has already been decided by this court in *Jefferis* v. *Land Company*, 134 U. S. 178, 189. A question between individuals, growing out of changes in the very place now in controversy, was then before this court; and in the opinion, after referring to the general rule, it was observed: "It is contended by the defendant that this well settled rule is not applicable to land which borders on the Missouri River, because of the peculiar character of that stream and of the soil through which it flows, the course of the river being tortuous, the current rapid, and the soil a soft, sandy loam, not protected from the action of water either by rocks or the roots of trees; the effect being that the river cuts away its banks, sometimes in a large body, and makes for itself a new course, while the earth thus removed is almost simultaneously deposited elsewhere, and new land is formed almost as rapidly as the former bank was carried away. But it has been held by this court that the general law of accretion is applicable to land on the Mississippi River; and, that being so, although the changes on the Missouri River are greater and more rapid than on the Mississippi, the difference does not constitute such a difference in principle as to render inapplicable to the Missouri River the general rule of law." It is true that that case came here on demurrer to a bill, and it was alleged in the bill that the land was formed by "imperceptible degrees," and that the process of accretion "went on so slowly that it could not be observed in its pro-

gress; but, at intervals of not less than three or more months, it could be discerned by the eye that additions greater or less had been made to the shore." The state of facts disclosed by this averment was held not to take the case out of the law concerning accretion, and, after referring to some English authorities, it was said: "The doctrine of the English cases is, that accretion is an addition to land coterminous with the water, which is formed so slowly that its progress cannot be perceived, and does not admit of the view that in order to be accretion the formation must be one not discernible by comparison at two distant points of time." And then was quoted from the opinion in *St. Clair* v. *Lovingston*, 23 Wall. 46, these words: "The test as to what is gradual and imperceptible in the sense of the rule is, that though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on."

The case before us is presented on testimony, and not on allegation. But what are the facts apparent from that testimony? The Missouri River is a winding stream, coursing through a valley of varying width, the substratum of whose soil, a deposit of distant centuries, is largely of quicksand. In building the bridge of the Union Pacific Railway Company across the Missouri River, in the vicinity of the tracts in controversy, the builders went down to the solid rock, sixty-five feet below the surface, and there found a pine log a foot and a half in diameter — of course, a deposit made in the long ago. The current is rapid, far above the average of ordinary rivers; and by reason of the snows in the mountains there are two well known rises in the volume of its waters, known as the April and June rises. The large volume of water pouring down at the time of these rises, with the rapidity of its current, has great and rapid action upon the loose soil of its banks. Whenever it impinges with direct attack upon the bank at a bend of the stream, and that bank is of the loose sand obtaining in the valley of the Missouri, it is not strange that the abrasion and washing away is rapid and great. Frequently, where above the loose substratum of sand there is a deposit of comparatively solid soil, the washing out of the

underlying sand causes an instantaneous fall of quite a length and breadth of the superstratum of soil into the river; so that it may, in one sense of the term, be said that the diminution of the banks is not gradual and imperceptible, but sudden and visible. Notwithstanding this, two things must be borne in mind, familiar to all dwellers on the banks of the Missouri River, and disclosed by the testimony: that, while there may be an instantaneous and obvious dropping into the river of quite a portion of its banks, such portion is not carried down the stream as a solid and compact mass, but disintegrates and separates into particles of earth borne onward by the flowing water, and giving to the stream that color which, in the history of the country, has made it known as the "muddy" Missouri; and, also, that while the disappearance, by reason of this process, of a mass of bank may be sudden and obvious, there is no transfer of such a solid body of earth to the opposite shore, or anything like an instantaneous and visible creation of a bank on that shore. The accretion, whatever may be the fact in respect to the diminution, is always gradual and by the imperceptible deposit of floating particles of earth. There is, except in such cases of avulsion as may be noticed hereafter, in all matter of increase of bank, always a mere gradual and imperceptible process. There is no heaping up at an instant, and while the eye rests upon the stream, of acres or rods on the forming side of the river. No engineering skill is sufficient to say where the earth in the bank washed away and disintegrating into the river finds its rest and abiding place. The falling bank has passed into the floating mass of earth and water, and the particles of earth may rest one or fifty miles below, and upon either shore. There is, no matter how rapid the process of subtraction or addition, no detachment of earth from the one side and deposit of the same upon the other. The only thing which distinguishes this river from other streams, in the matter of accretion, is in the rapidity of the change caused by the velocity of the current; and this in itself, in the very nature of things, works no change in the principle underlying the rule of law in respect thereto.

Our conclusions are that, notwithstanding the rapidity of

the changes in the course of the channel, and the washing from the one side and on to the other, the law of accretion controls on the Missouri River, as elsewhere; and that not only in respect to the rights of individual land owners, but also in respect to the boundary lines between States. The boundary, therefore, between Iowa and Nebraska is a varying line, so far as affected by these changes of diminution and accretion in the mere washing of the waters of the stream.

It appears, however, from the testimony, that in 1877 the river above Omaha, which had pursued a course in the nature of an ox-bow, suddenly cut through the neck of the bow and made for itself a new channel. This does not come within the law of accretion, but of that of avulsion. By this selection of a new channel the boundary was not changed, and it remained as it was prior to the avulsion, the centre line of the old channel; and that, unless the waters of the river returned to their former bed, became a fixed and unvarying boundary, no matter what might be the changes of the river in its new channel.

We think we have by these observations indicated as clearly as is possible the boundary between the two States, and upon these principles the parties may agree to a designation of such boundary, and such designation will pass into a final decree. If no agreement is possible, then the court will appoint a commission to survey and report in accordance with the views herein expressed.

The costs of this suit will be divided between the two States, because the matter involved is one of those governmental questions in which each party has a real and vital, and yet not a litigious, interest.

WINONA AND ST. PETER RAILROAD COMPANY *v.* PLAINVIEW.

SAME *v.* ELGIN.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

Nos. 171, 172. Argued January 27, 28, 1892. — Decided February 29, 1892.

In this case, which was a writ of error to the Supreme Court of a State, it was contended that that court did not give to a judgment of a Circuit Court of the United States such faith and credit as it was entitled to under the Constitution and laws of the United States; and that it disregarded the provision of the Constitution of the United States that no State shall pass any law impairing the obligation of a contract. *Held*, that the first contention was incorrect; that the question as to the impairment of the obligation of a contract was raised for the first time in this court, and was not accurate in fact; and that the writ of error must be dismissed.

By an act of the legislature of the State of Minnesota, approved March 5, 1877, (General Laws of Minnesota of 1877, c. 106,) it was enacted, by sections 4, 5, 6 and 7 thereof, as is printed in the margin.[1]

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[1] Sec. 4. Whenever any such railroad company, specified in the first section of this act, shall desire aid in the construction of its railroad from any county, town, city or village specified in said first section, it shall make and deliver to the county auditor of such county, the town clerk of such town or the clerk of such incorporated city or village, as the case may be, a definite proposition in writing, signed by the president and secretary of said railroad company, and sealed with its seal, which proposition shall contain a statement of the amount of bonds desired, the time when payable, and whether payable before maturity at the option of such municipality, the rate of interest which they shall bear, and such proposition shall contain a statement specifying when said bonds are to be delivered with reference to the time of the entire or partial construction of said railroad, and may contain a statement that such bonds may be deposited in escrow prior to the delivery to the railroad company; and such proposition shall contain a statement that the said railroad company will, in consideration of said bonds, at the election of such municipality, issue to the municipality from

Purporting to proceed under sections 4 and 7 of that act, the Plainview Railroad Company, a Minnesota corporation, on the

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which it is to receive the same, such number of the shares of its capital stock as will at par value of such stock correspond with the principal sum of such bonds. In case such bonds are proposed to be deposited in escrow as aforesaid, the proposition shall also state that the certificate of the stock to be exchanged therefor shall be placed with the same depository at the same time, and in that case the proposition shall set forth the full name and residence of the trustee or trustees, who shall be the custodian of the stock of said company and of the bonds of such city, village, town or county; the auditor or clerk with whom any such proposition shall be filed shall immediately endorse thereon the date of its receipt by him, and transcribe the same into the record book of the county, town, city or village, as the case may be, of which he is such clerk.

SEC. 5. The mode of arriving at such mutual agreement as is hereinbefore specified, shall be as follows:

First — Upon receiving such proposition, the county auditor of such county, the town clerk of such town, or the clerk of such incorporated city or village, as the case may be, shall immediately publish a notice of an election to be held by the legal voters of such county, town incorporated city or village, at the usual place or places of holding elections therein, and at such time as such clerk may designate, not less than ten (10) days or more than twenty (20) days from the date of such notices, which notice shall contain a substantial statement of the proposition made by said railroad company for the issue of the bonds of such municipality, and shall notify the legal voters thereof to deposit a ballot upon which shall be written or printed the words, "for the railroad proposition," or the words, "against the railroad proposition." And such notice shall be posted in three (3) public places in each election precinct in the district in which aid is desired, at least seven (7) days before the day of such election, and shall also be published at least twice before such election in one newspaper in such city, village or town, if any is published therein, and if the aid is asked of a county, in one newspaper in each village and city in such county in which a newspaper is published, and if there is no newspaper published in such city, village, town or county, then such notice shall be so published in a newspaper published at the nearest place thereto in which one is published.

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Fourth — If a majority of the legal voters who shall vote upon the question at any election to be held in any such county, town, city or village, in pursuance of the provisions of this act, shall, as indicated by the official returns of any such election, vote "for the railroad proposition," then such mutual agreement for the issue of bonds by such municipality and of stock by such railroad company, as provided in this act, shall be deemed and considered to have been arrived at and perfected, and thereupon such bonds

31st of January, 1878, delivered to the town clerk of the town of Plainview a proposition in writing, signed by the president

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and stock shall be issued and delivered by the proper officer in conformity with the true intent of such proposition and with the provisions of this act.

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And provided further, That the board of county commissioners of any such county, or the board of supervisors of any such town, or the common council of any such village or city, may, in case it shall deem it for the interest of such county, town, village or city, to do so, waive the issuance by such railroad company of any such stock to such county, town, village or city.

SEC. 6. No bonds shall be delivered to the company under such proposition until the road, branch or extension thereof for the construction of which the aid has been granted shall have been completed ready for the passage of cars continuously from one terminus through or to the district granting the aid or to the nearest point in its line to such district, or from such terminus to such point as the company in its proposition shall have proposed to construct said road where the line of the road shall not lie through the district.

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SEC. 7. Another mode of arriving at such mutual agreement shall be as follows:

First — Within three (3) months after the filing of any such proposition as is specified in the fourth (4th) section of this act with any county auditor, town clerk or clerk of any city or village, as the case may be, the said railroad company shall cause notice to be given as prescribed in the fifth (5th) section of this act, in three (3) public places in each election precinct in the district in which aid is desired, stating that after a day named in said notice, which shall be at least five (5) days after its date, a petition to the proper authorities of such county, town, city or village will be presented to the resident taxpayers of such county, town, city or village for their signatures, asking such authorities to agree to such proposition, and such petition shall be appended to a substantial copy of such proposition.

Second — If, within four months after the filing of such proposition with any such county auditor, town clerk, or clerk of any city or village, as the case may be, the said railroad company shall deliver to such clerk a substantial copy or copies of such proposition, so filed, with such petition to the proper authorities of such county, town, city or village, asking such authorities to agree to such proposition appended thereto, bearing the signatures of a majority of the persons residing in such county, town, city or village, who were assessed for taxes upon real or personal estate, in such county, town, city or village, as the case may be, as shown by the last assessment roll of the district of which aid is desired, which signatures shall be verified by the affidavit of some person witnessing such signatures; then

and secretary of the company, containing the statements and specifications required by section 4 of the act, and stating that the amount of the bonds of the town desired by the company was $50,000. The town clerk endorsed on the proposition the date of filing, and transcribed the proposition in his records on March 30, 1878. On the 31st of January, 1878, the company posted in three public places in the town a notice that, after February 6, 1878, a petition to the supervisors of the town, appended to a copy of said proposition, would be presented to the resident taxpayers of the town, asking the supervisors to agree to the proposition. The notice and the proposition were published in a newspaper printed and published in the town.

On the 30th of March, 1878, within three months after the filing of the proposition with the town clerk, the company delivered to him four petitions, in the form required by section 7 of the act, addressed to the town board of supervisors, stating that the petitioners, being residents of the town and assessed for taxes upon real or personal estate therein, as shown by its last assessment roll, asked the supervisors, as the proper authorities of the town, to agree to the proposition of the company to which the petition was appended. The petitions bore the signatures of a majority of the persons residing in the town who were assessed for taxes on real or personal estate therein, as shown by its then latest assessment roll, and the signatures were verified by the affidavits of the persons witnessing such signatures; but the petitions were not signed by a majority of the electors or legal voters of the town. Those petitions were the only ones ever made asking the authorities of the town to agree to the proposition of the company, and they and section 7 of the act constituted the only authority had or claimed for the issue of the bonds hereinafter mentioned. No election was held in the town to author-

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such mutual agreement for the issue of bonds by such municipality and of stock by such railroad company shall be deemed and considered to have been arrived at and perfected, and thereupon such bonds and stock shall be issued and delivered in conformity with the true intent and meaning of such proposition, and with the provisions of this act.

Statement of the Case.

ize its supervisors to agree to the proposition or to the issue of any such bonds.

On the 30th of March, 1878, the board of supervisors of the town adopted and placed on file in the office of the town clerk resolutions which recited the proposition of the company, the posting of the notices and the presenting of the petitions, with signatures and affidavits, from which it appeared that a majority of the resident taxpayers of the town, assessed for taxes upon real or personal estate therein, as shown by its last assessment roll, had signed the petitions, and that the construction of the railroad by the company, as set forth in its proposition, would promote the general prosperity and welfare of the taxpayers of the town. The resolutions were, that the proposition of the company was accepted, so far as related to the issue of bonds; that bonds of the town to the amount of $50,000, with interest coupons attached and payable as requested in the proposition, be issued to the company as soon as it should have its railroad completed, with the cars running thereon; and that the issue of stock to the town by the company, in consideration of the bonds, was waived.

The company constructed its railroad, had the cars running thereon, and performed what was stated in the proposition, except that it never issued to the town any stock of the company.

Before any bonds of the town were issued to the company, one George W. Harrington, a resident citizen and taxpayer of the town, brought a suit in the District Court for Wabasha County, in which county the town is situated, against the town and its officers and the railroad company, setting forth the proceedings on which the bonds were to be issued; that they were illegal; and that it was intended to issue the bonds; and praying that the town and its officers, particularly the chairman of the board of supervisors and the town clerk, might be enjoined from issuing, and the railroad company from accepting or receiving, any such bonds. The town answered the complaint, and in January, 1879, the case was tried by the District Court, which, on February 6, 1879, gave judgment for the defendants and dismissed the suit. Har-

rington took an appeal to the Supreme Court of the State, but, before it was perfected, the bonds were issued and delivered to the company. The Supreme Court, on October 6, 1880, reversed the judgment below, its opinion being reported in 27 Minnesota, 224. It held that, under the Constitution of Minnesota, it was not competent for the legislature to authorize any person or class of persons, other than the electors of a town or the officers chosen by such electors, to determine what action, requiring local taxation, the town would take in any particular case; that, therefore, section 7 of chapter 106 of the Laws of 1877, which assumed to empower a majority of the "resident taxpayers," whether they were electors or not, to bind a town to issue its bonds to aid in the construction of a railroad, was unconstitutional and void; and that, although the mode for authorizing the issue of bonds provided by section 7 was invalid, yet, as the same act provided another mode for authorizing such issue, which was valid, and as the bonds need not recite under which of the two provisions of the act they were issued, but only that they were issued under and pursuant to such act generally, and a purchaser would then have the right to presume that they were issued under its valid provisions, and there might thus be *bona fide* purchasers of the bonds, a suit for an injunction would lie to restrain the issuing of the bonds by the town officers under the invalid mode provided by section 7 of the act.

On the 18th of March, 1879, the town board of supervisors passed a resolution that the town issue to the company its bonds in the sum of $50,000, dated on January 1, 1879, to become due on or before 20 years from that date, with interest thereon, payable annually, at seven per cent per annum; that the bonds be signed and issued by the chairman of the board and the town clerk; and that the issue of stock by the company to the town in a corresponding amount was waived. The bonds were issued on the 19th of March, 1879, being one hundred in number, and numbered consecutively from 1 to 100, each purporting to be the bond of the town of Plainview, payable to the Plainview Railroad Company or bearer, for $500, dated January 1, 1879, due on or before January 1, 1899,

with interest at seven per cent per annum, payable annually, according to the conditions of the twenty interest coupons attached, one of them payable January 1, 1880, and one on January 1 of each year thereafter until the maturity of the bond. Each bond contained on its face the following statement: "This bond is issued in pursuance of a mutual agreement between the said town and the said railroad company, which agreement was made in accordance with the laws of the State of Minnesota, and through and by a proposition made by said railroad company, and duly accepted by said town upon petition therefor signed by a majority of the resident taxpayers of said town, said agreement having been fully performed by the said railroad company on its part. This bond is issued in pursuance of the authority given for that purpose by the laws of the State of Minnesota and in compliance with a resolution of the board of supervisors of said town."

The company, on or about July 9, 1879, sold, transferred and delivered the bonds and coupons to citizens of the State of Wisconsin, who purchased the same without notice of any facts invalidating the bonds, and paid the company $50,000 for them. The bonds and coupons were purchased and acquired by Samuel Marshall and Charles F. Ilsley, citizens of Wisconsin, who purchased them in good faith, for value, without notice of any facts invalidating them. On the 29th of January, 1881, Marshall and Ilsley commenced an action at law in the Circuit Court of the United States for the District of Minnesota against the town of Plainview, to recover the amount of 46 coupons for $35 each, cut from said bonds, which coupons fell due January 1, 1881. The action was defended by the town, and was tried before the Circuit Court without a jury, which found in favor of the plaintiffs and entered a judgment in their favor for $1746.98. The opinion of the Circuit Court of the United States is reported in 3 Mc Crary, 35. It held that the recitals in the bonds were conclusive evidence in favor of a purchaser without further information; that the conditions precedent prescribed by the statute had been complied with; that, as the law under which the bonds were issued had been recognized as valid by the highest court of the State of

Minnesota, before they were purchased by Marshall and Ilsley, no subsequent decision could affect their validity in the hands of such purchasers; and that the rule charging every one with notice of pending suits was inapplicable where negotiable securities constituted the subject matter. The case referred to by the Circuit Court, as that in which the Supreme Court of Minnesota had recognized section 7 of chapter 106 of the Laws of 1877 as constitutional and valid, was that of *State* v. *Town of Highland*, 25 Minnesota, 355, decided January 10, 1879. The Circuit Court arrived at the conclusion that, as the bonds in question had been purchased by Marshall and Ilsley before the case of *Harrington* v. *Plainview Railroad Company* had been decided by the Supreme Court of Minnesota, and that court had said nothing on the subject previously except what was contained in its opinion in *State* v. *Town of Highland*, the bonds were not affected by the decision in the *Harrington Case*. As to the point that the bonds were invalid in the hands of Marshall and Ilsley, from the fact that they were purchased during the pendency of the Harrington suit, the Circuit Court made answer that said purchasers were not parties to that suit and had no knowledge of it, and that the rule that all persons were bound to take notice of a pending suit did not apply to negotiable securities, citing *County of Warren* v. *Marcy*, 97 U. S. 96.

Thereafter, Marshall and Ilsley brought five other suits against the town of Plainview, to recover severally upon coupons cut from said bonds, which coupons became due from year to year, two of which suits were defended by the town, and in all of them judgments were recovered against it, amounting respectively to $1717.31, $4154.08, $2595.57, $771.15 and $3906.22, three of which six judgments the town paid.

Like judgments with those against the town of Plainview were recovered in the Circuit Court of the United States for the District of Minnesota by Marshall and Ilsley against the town of Elgin, Minnesota, and one of the judgments against each of the two towns was brought to this court by a writ of error. Neither of the two judgments exceeding $5000, this court dismissed the writ of error in each case, 106 U. S. 578,

583, for want of jurisdiction in this court, although the defendants in error were holders and owners of bonds to the amount of more than $5000, from which the coupons sued on in the two cases were cut.

On the 3d of March, 1881, an act passed by the legislature of Minnesota was approved by the governor, entitled "An act to authorize the Winona and Saint Peter Railroad Company to purchase the stock and to purchase or lease the property and franchises of the Plainview Railway Company," Special Laws of Minnesota of 1881, c. 414, the provisions of which were as follows: "Section 1. The Winona and Saint Peter railroad company is hereby authorized to purchase the stock or to purchase or lease the property and franchises of the Plainview railway company; and said last-named company hereby authorized to sell and convey or to lease its property and franchises to the said first-named company, upon such terms as may be agreed upon by the respective boards of directors of said companies, so as to make the property and franchises of the last-named company a part of the property and franchises of said Winona and Saint Peter railroad company to be used and operated by it under its charter. *Provided*, that, any such purchase of the property or franchises of the Plainview railway company shall be made, and all such property held by said Winona and Saint Peter railroad company, subject to all demands, claims and rights of action against said Plainview railway company, arising or growing out of the latter company's having heretofore obtained and disposed of certain bonds and coupons purporting to have been issued by the towns of Plainview, Elgin and Viola to said Plainview railway company, and in taking such transfer under this act said purchasing company shall assume all claims and demands against said Plainview railway company to the extent and value only of the property and franchises so transferred. Sec. 2. The Winona and Saint Peter railroad company is hereby authorized to issue its capital stock to an amount necessary to make and complete the purchase aforesaid. Sec. 3. This act shall take effect and be in force from and after its passage."

Statement of the Case.

In September, 1884, the town of Plainview brought a suit against the Winona and Saint Peter Railroad Company, in the District Court for the county of Wabasha in the State of Minnesota, the complaint in which set forth the making by the Plainview Railroad Company of the proposition in writing and the aforesaid acts of compliance with the provisions of chapter 106 of the Laws of 1877, and the filing with the town clerk of the petitions signed by the taxpayers, and alleged that the petitions were not signed by a majority of the electors or legal voters of the town; that no election was held in the town to authorize the supervisors to agree to the proposition or to issue any bonds; that the. board of supervisors adopted the resolutions before referred to without authority or right from the electors of the town or otherwise, the supervisors and the railroad company well knowing that a majority of the electors or legal voters of the town had not signed the petitions and that no election had been held authorizing the passing of the resolutions; that there was no authority to pass the same, or to bind the town thereby, or to issue the bonds; that the bonds were issued and delivered to the company; and that the latter, on or about July 9, 1879, intending to injure and defraud the town and deprive it of any defence to the bonds or coupons as against *bona fide* holders thereof for value, sold and transferred the bonds to citizens of Wisconsin, who purchased the same of the company *bona fide*, without notice of any of the facts invalidating the bonds, and paid the company $50,000 therefor. The complaint then set out the suits and judgments against the town by Marshall and Ilsley, and the passing of the act of March 3, 1881, and averred that the passage of that act was procured by the Winona and Saint Peter Railroad Company, and the act duly accepted and assented to by that company; that the bonds and coupons mentioned in that act were the same before referred to, and the said company under said act issued and disposed of its stock to an amount necessary to make and complete the purchase authorized by the act; and that, about May, 1881, that company, acting solely under the provisions of the act, purchased all the property and franchises of the Plainview Rail-

road Company, of the value of $200,000, and in making such purchase, and as part of the consideration therefor, assumed all claims, demands and rights of action against the Plainview Railroad Company, as provided in the act, including the claim, demand and right of action set forth in the complaint, and agreed to pay the same. The complaint demanded judgment against the Winona and Saint Peter Railroad Company for $50,000, with interest from January 1, 1879, at seven per cent per annum.

The record shows that on the 11th of May, 1881, the Plainview Railroad Company conveyed, by an instrument in writing, to the Winona and Saint Peter Railroad Company all its railroad, about sixteen miles in length, and all its franchises and property, for the consideration of $225,000 paid, "and by virtue of the power and authority conferred upon the parties" by the act of March 3, 1881.

The defendant put in an answer to the complaint, denying its liability, to which answer the plaintiff replied. Evidence was given as to the suit of Harrington and the suits of Marshall and Ilsley against the town, and the case was tried in June, 1885, before the District Court for Wabasha County, which made findings of fact and conclusions of law, on December 26, 1885, and entered a judgment for the plaintiff for $74,451.31, being $50,000 with interest from January 1, 1879, at seven per cent per annum.

The defendant moved for a new trial, which was denied in May, 1886, and it then appealed to the Supreme Court of Minnesota from the order denying the motion. The case was decided by that court April 28, 1887, (36 Minnesota, 505,) and it affirmed the order denying the motion for a new trial, and adjudged that the plaintiff have judgment accordingly. On the mandate of the Supreme Court, the District Court gave judgment for the plaintiff for $80,031.86 damages and $257.09 costs and disbursements, being in all $80,288.95. From that judgment the defendant took a further appeal to the Supreme Court of the State, which court affirmed the judgment below, for the reasons given in the opinion of the court, reported in 36 Minnesota, 505, and directed judgment accordingly, which

was entered in the Supreme Court. To review that judgment, a writ of error was sued out from this court on the allowance of the chief justice of the Supreme Court of Minnesota.

The writ of error in the case of *Winona and Saint Peter Railroad Company* v. *Town of Elgin*, (No. 172,) is presented for consideration at the same time with the case of the town of Plainview, and was argued at the same time on the same briefs. The two cases have gone along together *pari passu* in the lower courts, and the proceedings in them have been alike, *mutatis mutandis*. The bonds in the case of the town of Elgin were for $40,000, being eighty in number, of $500 each, bearing date January 1, 1879, and containing the same recital as in the case of the town of Plainview. The judgments in favor of Marshall and Ilsley against the town of Elgin were five in number, being respectively for $1696.85, $1443.91, $2852.85, $2745.12, and $3175.82, all recovered upon coupons. The judgment of the Supreme Court of Minnesota against the plaintiff in error here in the suit brought against it by the town of Elgin was rendered July 30, 1887, for $64,245.77. In 36 Minnesota, 517, the Supreme Court says that the case of the town of Elgin against the railroad company was argued and submitted with the case of the town of Plainview against the same defendant, and involved the same questions; and that court affirmed the order of the lower court.

In the decision reported in 36 Minnesota, 505, the first opinion was given by Judge Vanderburgh and concurred in by Judge Berry. A second opinion was given by Chief Justice Gilfillan and Judge Dickinson. Judge Mitchell dissented. In the first opinion, it was said that the question of the validity of the bonds was considered and determined in *Harrington* v. *Town of Plainview*, 27 Minnesota, 224; that the bonds were not issued on the vote of the electors of the town, in pursuance of section 5 of chapter 106 of the Laws of 1877, but in pursuance of section 7 of that statute, on the petition of a majority of the resident taxpayers; that the proceedings to procure the bonds were initiated and prosecuted by the railroad company under the act, by filing with the town clerk its

proposition in writing, as provided by section 4 of the act, for the issue to it of the bonds of the town, and thereafter by securing and filing the petition of the taxpayers, as directed by section 7; and that the evidence in the case was sufficient to uphold the finding of the trial court that the bonds in controversy were issued to the Plainview Railroad Company, and by its agents transferred to the Chicago and Northwestern Railroad Company, at their par value, in consideration of the amount due to the latter company, which it had previously advanced in aid of the construction of the other company's railroad. The first opinion then proceeded as follows: "Before the issuance of the bonds, the action above referred to was commenced to enjoin the same, and, while the case was pending in this court, the bonds were issued and transferred. The evidence, however, does not warrant the conclusion that there was any actual fraud in the procurement or transfer of the bonds. Both railway companies were cognizant of the pendency of the action, and of the grounds of the alleged invalidity of the bonds; but the legal questions involved were still open and in dispute, and they were advised and believed them to be legal and valid. It is affirmed by the trial court, upon sufficient evidence, that, except as appears upon the face of the bonds, Marshall and Ilsley, and others, to whom they were subsequently transferred, had no notice of the suit, and were *bona fide* purchasers and holders for value. The Chicago and Northwestern Railway Company was a foreign corporation, and the subsequent purchasers of the bonds were and are citizens of other States. The bonds all recite on their face that they were issued in pursuance of the authority given for that purpose by the laws of the State of Minnesota, and in compliance with a resolution of the board of supervisors of the town, and also 'in pursuance of a mutual agreement, between the said town and the said railroad company, which agreement was made in accordance with the laws of the State of Minnesota, and through and by a proposition made by said railroad company and duly accepted by said town, upon petition therefor signed by a majority of the resident taxpayers of said town, said agreement having been duly performed by said railroad

company on its part.' This court held in the *Harrington Case* that an agreement, consummated by proceedings under the provisions of the statute referred to, between the railway company and the majority of the taxpayers, could not, under the Constitution, be considered as the lawful agreement of the town, nor be of any binding obligation as such, and that bonds issued in pursuance thereof would be void, except in the hands of *bona fide* purchasers."

The first opinion then said, that the bonds were invalid in the hands of the Plainview company, and could not have been enforced by it; that although that company had built its road, there was no agreement made with the town; that the town, in its corporate capacity, had received nothing, been guilty of no laches, and waived nothing, and there was no estoppel; and that it was entitled to be protected against the unauthorized acts of its own officers, when that could be done without injury to third parties, citing *Thomas* v. *City of Richmond*, 12 Wall. 349, 356, and *Town of South Ottawa* v. *Perkins*, 94 U. S. 260. The first opinion also said, that, while the recitals in the bonds were sufficient to put the purchasers upon inquiry as to the authority for the issue of the bonds and the manner in which they were in fact issued, and by the recitals all purchasers were chargeable with notice of the invalidity of the bonds, Marshall and Ilsley had brought suit upon the coupons in the Circuit Court of the United States for the District of Minnesota, and the bonds had been duly adjudged and determined, in a trial upon the merits in that court, to be valid in their hands, and the result of that judgment was to make the bonds valid negotiable securities, held by them as *bona fide* purchasers; that, as the Plainview company and the Winona and Saint Peter company were not parties to that action, the town was not estopped from litigating in the state courts the questions involved in the case; that the judgment of the Circuit Court of the United States could not be reviewed or modified by the state courts; that the result of its decision and judgment was to fix irrevocably the liability of the town for the whole amount of the indebtedness evidenced by the bonds; and that it must be deemed, therefore, to have been settled

conclusively that the bonds had been transferred to parties in whose hands they had become valid and legal obligations against the town.

It was further said, that it was determined conclusively, by the judgment in *Harrington* v. *Town of Plainview*, that the bonds were void in the hands of the Plainview company, that company having had its day in court in that case; that the issuing and disposition of the bonds must be treated by the state courts as unlawful and wrongful; that, as the bonds, when once placed on the market, were liable to pass into the hands of purchasers who would be entitled to enforce the same as valid negotiable securities in the United States courts, it followed that the town had a cause of action for damages; that the Plainview company transferred the bonds for full value, in payment of moneys advanced for building its road, and Marshall and Ilsley paid nearly par for them; that they were treated by all parties as valuable commercial securities, placed on the market and sold, and enforced as such against the town; and that, as the bonds were invalid and the Plainview company acquired no title to them as obligations of the town, it could not claim to be entitled to the proceeds of them as its property.

It was further said that, as the Plainview company received the full face value of the bonds, the amount of the recovery would be the same whether the suit was one for money had and received or one for a conversion; that the allegations of the complaint and the findings of fact were sufficient to support the action in either form; that the title to the bonds had been confirmed in the present holders of them, who had recovered, or would recover, the full amount thereof; that the liability of the town had been fixed through the acts of the Plainview company in procuring and negotiating the bonds, which acts were unauthorized and wrongful; that such proceedings as would result in the enforcement of the bonds must be presumed to have been intended and contemplated by the Plainview company, either in its own hands or by purchasers who might occupy a more advantageous position, and it could not be permitted to object that the bonds were of no value, or

allege its own wrong, for the purpose of defeating the action, (citing *Comstock* v. *Hier*, 73 N. Y. 269; *Lamb* v. *Clark*, 15 Pick. 193, 197;) and that the town was not estopped or concluded by the result of the suit of Marshall and Ilsley, to which the Plainview company was not a party.

The first opinion further held that, under the provision of the act of March 3, 1881, that the Winona and Saint Peter company should make the purchase from the Plainview company "subject to all demands, claims and rights of action against said Plainview Railway Company arising or growing out of the latter company's having heretofore obtained and disposed of certain bonds and coupons purporting to have been issued by the towns" named to the Plainview company, the Winona and Saint Peter company acquired the property and franchises of the Plainview company by virtue of that act, and of course took the grant *cum onere* and subject to the provisions and conditions of the act. The conclusion was that the town was entitled to recover, and that the order denying a new trial should be affirmed.

The second opinion concurred in the conclusion of the first opinion, but based the responsibility of the company on the following considerations, viz.: That the company, having procured the unauthorized execution and delivery to itself of the bonds, in form expressing the obligation of the town, and having negotiated them so that they had come into the hands of parties who had enforced a recovery upon them by proper action in a competent tribunal, was answerable for its own unauthorized acts, which had resulted in that injury to the town, unless the recovery upon the bonds was to be deemed to be too remote a consequence to afford a ground of legal liability; that, as to the acts of the company, the injurious consequence was not remote, but proximate; that, when the company procured and disposed of the bonds, it must be deemed to have contemplated that the town should pay the bonds, either voluntarily or by legal compulsion; that it made no difference if the judgment by which the liability of the town to pay the bonds had been conclusively established was erroneous; and that that did not make remote the damage complained of.

Argument for Plaintiff in Error.

The Federal questions alleged to be involved in these cases are thus stated by the plaintiff in error: (1) Did the Supreme Court of Minnesota, in rendering its judgments in these cases, fail to give to the judgments of the United States Circuit Court in the Marshall and Ilsley cases such faith and credit as they were entitled to under the Constitution and laws of the United States? (2) Did it, in rendering these judgments, disregard the provision of the Constitution of the United States that no State shall pass any law impairing the obligation of a contract? They are otherwise stated in another of the briefs for the plaintiff in error as follows: (1) The Supreme Court of Minnesota, in rendering the judgments under review, disregarded the provision of the Constitution of the United States that no State shall pass any law impairing the obligation of a contract, in that it erroneously decided that the contracts and bonds of the towns were invalid, and on that ground gave effect to the act of March 3, 1881, as making the Winona and Saint Peter Railroad Company liable for the transfer of the bonds; (2) The Supreme Court, in rendering its judgments in these cases, disregarded the Constitution and laws of the United States in deciding that the Winona and Saint Peter Railroad Company was liable to the towns, because it was responsible for the consequences to them of the judgments in the Marshall and Ilsley cases, although the company would not have been liable but for said judgments.

The towns have moved to dismiss the writs of error for want of jurisdiction in this court, on the ground that the records present no Federal question.

Mr. Lloyd W. Bowers (with whom was *Mr. Thomas Wilson* on the brief) for plaintiff in error.

I. It is not necessary, in order that a subsequent statute shall impair a previous contract's obligation, that the statute should itself be made the reason for declaring the contract invalid or for restricting the contract's full and proper operation. Even if, as here, the state court declares the contract invalid on grounds independent of the later statute, still if the de-

clared invalidity of the contract, though placed upon such independent or general grounds, is made the reason for giving the subsequent statute an effect which it could not have but for the contract's invalidity, the contract is impaired by the later act. The essential thing is only that the subsequent act be given an effect which it cannot properly have if the contract is valid. An inconsistency between the subsequent statute, as judicially given effect, and the rights growing out of the contract, correctly construed, makes a case of impairment of the obligation of the contract. *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116, 144, 145; *Delmas* v. *Merchants Ins. Co.*, 14 Wall. 661; *University* v. *People*, 99 U. S. 309; *Wright* v. *Nagle*, 101 U. S. 791, 793, 794; *Louisville Gas Co.* v. *Citizens' Gas Co.*, 115 U. S. 683, 696; *Southwestern Railroad* v. *Wright*, 116 U. S. 231; *Vicksburg &c. Railroad* v. *Dennis*, 116 U. S. 665; *Given* v. *Wright*, 117 U. S. 648; *Chicago, Burlington &c. Railroad* v. *Guffey*, 120 U. S. 569; *Hoadley* v. *San Francisco*, 124 U. S. 639; *New Orleans Water Works* v. *Louisiana Sugar Co.*, 125 U. S. 18; *Yazoo & Miss. Valley Railroad* v. *Thomas*, 132 U. S. 174.

It is the effect actually given to a statute, subsequent to a contract and claimed to impair it, which determines whether, if the contract exists, the statute does in fact impair it. The statute, as construed by the state court, and with the operation there accorded it, is what this court looks at to decide whether a contract has had its obligation impaired.

II. It is settled on principle and by the express adjudications of this court that due effect is not given to the judgments of Federal courts sitting in a particular State unless they are accorded such effect as would in a like case, under similar circumstances, be accorded to the judgments of the state courts of equal authority in such State; and the question whether a state court has given such effect to any such judgment is a question arising under the Constitution and laws of the United States and falls within the jurisdiction of this court. *Crescent Live Stock Co.* v. *Butchers' Union*, 120 U. S. 141; *Embry* v. *Palmer*, 107 U. S. 3; *Dupasseur* v. *Rochereau*, 21 Wall. 130.

Did the Supreme Court of Minnesota in these cases give to

the judgments of the United States Circuit Court in Marshall and Ilsley's cases such force and effect as it would have allowed them had they been rendered by it? That it did not hardly admits of discussion; and it follows that it did not accord to them such credit and effect as it should have accorded under the Constitution.

To break the force of this conclusion counsel are understood to argue that the state courts are not bound to give full faith and credit, or any faith and credit, to judgments of the Federal courts except in a suit and between parties where such judgments would operate as a technical estoppel. This court has in well-considered language answered this contention. Speaking of the Federal courts, it says: "Their judgment or decree when rendered is binding and perfect between the parties until reversed, without regard to any adverse opinion or judgment of any other court of merely concurrent jurisdiction. Its integrity, its validity, and its effect are complete in all respects between all parties in every suit and in every forum where it is legitimately produced as the foundation of an action, or of a defence, either by plea or in proof, as it would be in any other circumstances. While it remains in force it determines the rights of the parties between themselves, and may be carried into execution in due course of law to its full extent, furnishing a complete protection to all who act in compliance with its mandate." *Crescent Live Stock Co.* v. *Butchers' Union*, 120 U. S. 141, 157. The learned counsel of the defendants in error rely on the case of *Dupasseur* v. *Rochereau*, 21 Wall. 130, which they claim is on all fours with this case and decisive of this question.

If I have intelligently read that case, all it decides is that, inasmuch as the judgment of the United States Circuit Court relied on by Dupasseur as a defence did not touch or affect the rights of either party or any question involved in that suit, the state court acted properly in not regarding it. It has no application to the question to which it is cited. *Green* v. *Van Buskirk*, 5 Wall. 307; *S. C.* 7 Wall. 139; *Crapo* v. *Kelly*, 16 Wall. 610; *Factors' & Traders' Ins. Co.* v. *Murphy*, 111 U. S. 738; *Crescent Live Stock Co.* v. *Butchers' Union*, 120 U. S. 141.

Mr. Cushman K. Davis and *Mr. Frank B. Kellogg* for defendants in error. *Mr. C. W. Bunn* was with them on the brief.

MR. JUSTICE BLATCHFORD, after stating the case, delivered the opinion of the court.

To present a Federal question on the ground that full faith and credit were not given by the state court to the judgments of the Circuit Court of the United States in the Marshall and Ilsley cases, it must appear that the state court denied to the plaintiff in error, within the terms of § 709 of the Revised Statutes, "some title, right, privilege or immunity" held by the plaintiff in error under the judgments of the Circuit Court of the United States in those cases, and claimed by it in the state court under the Constitution or a statute of the United States; and that the decision of the state court was against the title, right, privilege or immunity specially set up or claimed by the plaintiff in error under such Constitution or statute. This does not appear by the records. The Marshall and Ilsley cases were suits by citizens of Wisconsin against the towns. Neither the plaintiff in error nor the Plainview company was a party to those suits, nor was any one in privity with either company such party. Those cases settled only the question whether the towns were liable to Marshall and Ilsley on the bonds. They did not settle the rights of the towns, and of the Plainview company or the plaintiff in error, as between each other, with regard to the bonds. The Circuit Court of the United States sustained the validity of the bonds on the ground that Marshall and Ilsley were *bona fide* holders of them. The fact that the Supreme Court of Minnesota, in the present cases, did not acquiesce in the correctness of the decision of the Circuit Court of the United States, did not constitute a Federal question. Neither the Constitution of the United States nor any act of Congress guarantees to a suitor that the same rule of law shall be applied to him by a state court which would be applied if his citizenship were such that his suit might be brought in a Federal court. *Dupasseur* v.

Rochereau, 21 Wall. 130; *Brooks* v. *Missouri*, 124 U. S. 394; *French* v. *Hopkins*, 124 U. S. 524; *Chappell* v. *Bradshaw*, 128 U. S. 132; *Clark* v. *Pennsylvania*, 128 U. S. 395; *Hale* v. *Akers*, 132 U. S. 554; *Manning* v. *French*, 133 U. S. 186; *Giles* v. *Little*, 134 U. S. 645; *County of Cook* v. *Calumet & Chicago Canal Co.*, 138 U. S. 635.

The cases cited by the plaintiff in error, of *Green* v. *Van Buskirk*, 5 Wall. 307, and 7 Wall. 139; *Crapo* v. *Kelly*, 16 Wall. 610; *Factors' and Traders' Ins. Co.* v. *Murphy*, 111 U. S. 738; and *Crescent Live Stock Co.* v. *Butchers' Union*, 120 U. S. 141, are not applicable to the present cases.

The state court gave to the decisions of the Circuit Court of the United States all the effect which they could possibly have, namely, the conclusive settlement of the liability of the towns on the bonds to Marshall and Ilsley, as *bona fide* purchasers. The right of action of the towns depended upon sustaining the Marshall and Ilsley judgments as conclusive and not to be reviewed by the state courts. It was an essential element of the suits of the towns to show that they had been legally compelled to pay the bonds, in suits by *bona fide* holders of them. In pursuance of that claim, the state court held that the judgments of the Circuit Court of the United States were valid and conclusive in favor of the towns in the present suits. There was no question before the Circuit Court of the United States as to the liability of the towns to the Plainview company upon the bonds. The decisions of the Circuit Court of the United States held that Marshall and Ilsley, as *bona fide* purchasers of the bonds, acquired rights which were superior to those of the Plainview company. The judgments in the present suits are founded on the fact that the wrongful acts of the Plainview company enabled Marshall and Ilsley to acquire those rights.

The contention that the act of March 3, 1881, impaired the obligation of a contract is raised for the first time in this court. The records do not show that any such proposition was set up in, or considered by, the state court. *Butler* v. *Gage*, 138 U. S. 52.

No Federal question was involved in *Harrington* v. *Town*

of Plainview, 27 Minnesota, 224; but the bonds were held invalid on grounds independent of the act of March 3, 1881. That decision was made in October, 1880, before the act of March 3, 1881, was passed, and was followed by the state court in the present cases. The act of 1881 had no bearing upon the question of the validity of the bonds, and the state court gave to that act no effect on that question; so that these cases fall within the principle of *N. O. Water Works Co.* v. *La. Sugar Refining Co.*, 125 U. S. 18, 38, 39, because the state court decided them just as if the act of March 3, 1881, had not been passed. There was a perfect right of action in the towns against the Plainview company before the act of 1881 was passed; and such liability of the Plainview company was what the plaintiff in error assumed by proceeding under the act of 1881. That statute did not impose, and was not the cause of, such liability, but simply allowed the plaintiff in error to contract to assume such liability. The act of 1881 does not affect any prior contract. It merely declares that, if the Plainview company was liable to the towns for having obtained and disposed of the bonds, the plaintiff in error, if it should purchase the property and franchises of the Plainview company, must assume the liability of that company to the towns; and the plaintiff in error accepted and acted under the terms of the statute, on the express condition that it should be liable to the towns if the Plainview company were so liable.

The Plainview company could have raised no such question based on the act of 1881 as the plaintiff in error now seeks to raise. The bonds had been declared void by the state court, as between the Plainview company and the towns, in a suit to which the town of Plainview and the Plainview company were parties. The company had made the bonds, which were invalid in its hands, valid in the hands of *bona fide* purchasers, by transferring them. This took place before the act of 1881 was passed, and a right of action arose at that time in favor of the towns and against the Plainview company. Such right of action was made fruitless by the purchase of the property and franchises of the Plainview company by the plaintiff in error. It was necessary for the legislature to authorize the

sale and purchase, in order to make them valid, and, as a condition of such purchase, the statute imposed the liability in question on the plaintiff in error. The liability expressly covered all demands, claims and rights of action against the Plainview company arising out of its having "obtained and disposed of" the bonds and coupons purporting to have been issued by the towns. Therefore, the only question in the present suits left to be determined by the state court was whether, as the Plainview company had disposed of the bonds and coupons to *bona fide* purchasers, who had enforced them against the towns, a cause of action was created thereby in favor of the towns against the Plainview company. Inasmuch as, if these suits had been between the towns and the Plainview company, no Federal question would have been presented, there can be none in the present suits.

This court has jurisdiction only when the state court has given effect to a legislative enactment which impairs the obligation of a prior contract. No such thing exists in the present cases. The act of 1881 did not attempt to render invalid any contract between the towns and the Plainview company. Although the plaintiff in error was held liable by the state court by virtue of the act of 1881, that did not raise a Federal question, because the liability was one assumed voluntarily by the plaintiff in error. The liability of the Plainview company must first be established, before the act of 1881 can have any effect. The Supreme Court of Minnesota held the bonds invalid by reason of provisions in the constitution of the State, which were in force at the time of the passage of the act of 1877; and it did not hold them invalid by reason of the act of 1881. *Bethell* v. *Demaret*, 10 Wall. 537; *West Tenn. Bank* v. *Citizens' Bank of La.*, 13 Wall. 432, and 14 Wall. 9; *Delmas* v. *Ins. Co.*, 14 Wall. 661, 666; *Tarver* v. *Keach*, 15 Wall. 67; *Stevenson* v. *Williams*, 19 Wall. 572; *N. O. Water Works Co.* v. *Louisiana Sugar Refining Co.*, 125 U. S. 18, 35.

Moreover, the liability of the Plainview company to the towns, which is sought to be enforced in the present suits against the plaintiff in error, was founded on tort, and did not arise out of any contract relations. That liability was what

was assumed by the plaintiff in error; and no question can arise as to the impairment by the act of 1881 of the obligation of any contract.

The writs of error must be *Dismissed.*

MR. JUSTICE BREWER did not sit in these cases or take any part in their decision.

IRON SILVER MINING COMPANY *v.* MIKE AND STARR GOLD AND SILVER MINING COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

No. 2. Argued November 20, 23, 1891. — Decided February 29, 1892.

The term "known vein" Rev. Stat. § 2333 refers to a vein or lode whose existence is known, as contradistinguished from one which has been appropriated by location. The title to portions of a horizontal vein or deposit, generally called a "blanket vein," may be acquired under the sections of the Revised Statutes concerning veins, lodes, etc.

In ejectment for the possession of a mine, the plaintiff claimed under a placer patent, issued January 30, 1880, on an application made November 13, 1878, and entry and payment made February 21, 1879. The defendant claimed under a location certificate of a lode issued to one Goodell, dated March 10, and recorded March 11, 1879, reciting a location February 1, 1879. The defendant, to maintain its claim, offered the testimony of several witnesses, which this court holds to establish that in 1877, and more than a year before any proceedings were initiated with reference to the placer patent, the grantors of defendant entered upon and ran a tunnel some 400 feet in length into and through that ground which afterwards was patented as the placer tract; and that in running such tunnel they intersected and crossed three veins, one of which was thereafter, and in 1879, located as the Goodell vein or lode. The vein thus crossed and disclosed by the tunnel was from seventy-five to seventy-eight feet from its mouth, of about fifteen inches in width, with distinct walls of porphyry on either side, a vein whose existence was obvious to even a casual inspection by any one passing through the tunnel. At the trial the court ruled that if the vein was known to the placer patentee at or before entry and payment, although not known at the time of the application for patent, it was excepted from the property conveyed. *Held,*

(1) That this vein was a known vein at the time of the application for the placer patent;

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(2) That the plaintiff was bound to know of the existence of the tunnel, and what an examination of it would disclose;
(3) That it was a question for the jury whether there was sufficient gold or silver within the vein to justify exploitation, and to be properly a "known vein or lode" within the meaning of Rev. Stat. § 2333;
(4) That the time at which the vein or lode within the placer must be known in order to be excepted from the grant of the placer patent is the time at which the application for that patent was made; but that the plaintiff suffered no injury from the error in the instruction of the court below in that respect, as the facts which implied knowledge at the time of the entry and payment existed also at and before the date of the application;
(5) That the neglect of the parties who ran the tunnel to at once develop the vein was of no account, as it appeared that there was a prevalent belief that a rich blanket vein was underlying the entire country, and this was the object of pursuit by all;
(6) That the admission of evidence respecting that blanket vein was immaterial, as the attention of the jury was directed by the court to the vein disclosed by the tunnel as the known vein upon which the rights of defendant rested.

EJECTMENT. The plaintiff in error was plaintiff below, and claimed under a placer patent issued January 30, 1880, on an application made November 30, 1878, and entry and payment made February 21, 1879. The defendant claimed under a location certificate of a lode dated March 10, and recorded March 11, 1879, reciting a location February 1, 1879. This case was argued with No. 3 (*post*, 430) on the 25th and 26th of March, 1890; and on the 26th and 27th, No. 7 (*post*, 431) was argued. On the 10th of November, 1890, the court made the following order:

It is ordered that these cases be reargued before a full court, and then as one case. And the attention of counsel is specially directed to the discussion of the following questions:

First. What constitutes a "lode or vein" within the meaning of sections 2320 and 2333 of the Revised Statutes?

Second. What constitutes a "known lode or vein" within the meaning of section 2333?

Third. In what manner must the existence of such lode or vein be indicated to enable the applicant for a placer patent

to describe it, and tender the price for it per acre required by the government?

Fourth. Whether the existence of such lode or vein must be known, and its purchase applied for, when the application is made for the placer patent; and whether a lode or vein will be excluded from the patent, which is discovered after such application and before the patent is issued?

Fifth. Whether evidence of the existence of lodes or veins in the immediate vicinity of a placer claim is admissible to the jury, as tending to show the existence of such lode or vein within the boundaries of the claim? and

Sixth. Whether there was any legal evidence for the jury of the vein or lode claimed by the defendant in error in the first two cases, Nos. 6 and 7, [2 and 3] or by the plaintiffs in error in the third case, No. 16 [7]?

Counsel of the parties are requested to produce on the reargument models and diagrams showing the position and form of the placer claim of the plaintiff in error in Nos. 6 and 7, [2 and 3] and defendant in error in No. 16, [7] and the position in it of the alleged lodes of the defendant in error in Nos. 6 and 7, [2 and 3] and plaintiffs in error in No. 16, [7] and also of the tunnel alleged to run into the said claim, and also of the adjoining land so far as may be necessary to a full understanding of the questions involved.

The statutes referred to in this order and in the opinion of the court, *post*, will be found in the margin.[1] The three

[1] The court refers to the following sections of the Revised Statutes.

"SEC. 2320. Mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits heretofore located, shall be governed as to length along the vein or lode by the customs, regulations and laws in force at the date of their location. A mining claim located after the tenth day of May, eighteen hundred and seventy-two, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode, but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the

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cases were argued together in this court on the 20th and 23d of November, 1891, and the case made by the pleadings and arguments, in No. 2, as stated by the court was as follows:

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surface, except where adverse rights existing on the tenth day of May, eighteen hundred and seventy-two, render such limitation necessary. The end lines of each claim shall be parallel to each other."

"SEC. 2325. A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association or corporation authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of this chapter, may file in the proper land office an application for a patent, under oath, showing such compliance together with a plat and field-notes of the claim or claims in common, made by or under the direction of the United States Surveyor General, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land office, and shall thereupon be entitled to a patent for the land in the manner following: The register of the land office, upon the filing of such application, plat, field-notes, notices, and affidavits, shall publish a notice that such application has been made for the period of sixty days in a newspaper to be by him designated as published nearest to such claim, and he shall also post such notice in his office for the same period. The claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States Surveyor General that five hundred dollars' worth of labor has been expended on improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter."

"SEC. 2333. Where the same person, association or corporation is in possession of a placer claim, and also a vein or lode included within the boun-

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On the 20th of February, 1885, plaintiff in error, plaintiff below, filed its complaint in the District Court of Lake County, Colorado, in which it alleged that on the 1st day of January, 1884, it was the owner and in possession of a certain tract of land, known as the William Moyer placer, consisting of 56.69 acres, the particular description of which was given; and that on the 1st day of December, 1884, the defendant wrongfully entered upon said premises, and ousted the plaintiff from possession thereof, and still wrongfully retained such possession. The defendant answered that the patent for said placer was issued on the 30th day of January, 1880, and contained the following reservation: "That the grant hereby made is restricted in its exterior limits to the boundaries of the said lot No. 300, as hereinbefore described, and to any veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits, which may have been discovered within said limits subsequent to the date hereof, and not claimed or known to exist at the date hereof. Second. That should any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits be claimed or known to exist within the above-described premises at the date hereof the same is expressly excepted and excluded from these presents."

It also alleged that at the time of the location of the placer

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daries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer claim, or any placer claim not embracing any vein or lode claim shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section twenty-three hundred and twenty, is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof."

claim, and the survey thereof, and at the time of the application for the patent, there was a known lode, vein and deposit of mineral within the boundaries of said placer, called the Goodell lode, and that the patentee had knowledge of its existence. On the application of the plaintiff the case was removed to the Federal court, and there a replication was filed denying the existence of any known lode or vein at or before the issue of the patent. The case was tried before a jury in November, 1885, which trial resulted in a verdict and judgment for the defendant, and thereupon the plaintiff brought the case here on error.

Mr. L. S. Dixon and *Mr. Ashley Pond* for plaintiff in error. *Mr. James McKeen* and *Mr. Frank W. Owers* were on their brief.

Mr. T. M. Patterson for defendant in error.

Mr. Justice Brewer delivered the opinion of the court.

This and two kindred cases have been before us for consideration for some time. They have been twice argued, the reargument having been ordered by the court of its own motion; and on the second argument, at the like instance, very elaborate and complete models, maps and photographs were prepared by the respective parties and presented for our examination. The fact is, there was an earnest inquiry as to whether the court had not erred in its prior and repeated ruling, that a known lode, as named in section 2333 of the Revised Statutes, is something other than a located lode; and, also, whether, in view of the disclosures made in this, as in prior cases, of the existence of a body of mineral underlying a large area of country in the Leadville mining district, whose general horizontal direction, together with the sedimentary character of the superior rock, indicated something more of the nature of a deposit like a coal bed than of the vertical and descending fissure vein, in which silver and gold are ordinarily found, it did not become necessary to hold that the only pro-

visions of the statute under which title to any portion of this body of mineral, or the ground in which it is situated, can be acquired, are those with respect to placer claims. Of course, such conclusions would have compelled a revising of some former opinions, and have wrought great changes in the status of mining claims in that district. Because of this we have been very careful, and the investigations in these directions have been earnest and protracted. It would serve no useful purpose to state all the arguments which have been advanced and considered by us. It is enough to announce the results. Our conclusions are, first, in respect to the matter of the known vein, that the reasons so clearly stated by Mr. Justice Field, speaking for the court in the case of *Noyes* v. *Mantle*, 127 U. S. 348, 353, are unanswerable, and forbid an adjudication that the term "known vein" is to be taken as synonymous with "located vein," and compel a reiteration of the declaration heretofore made, that the term refers to a vein or lode whose existence is known, as contradistinguished from one which has been appropriated by location; and as to the other matter, that the title to portions of this horizontal vein or deposit, "blanket" vein as it is generally called, may be acquired under the sections concerning veins, lodes, etc. The fact that so many patents have been obtained under these sections, and that so many applications for patents are still pending, is a strong reason against a new and contrary ruling. That which has been accepted as law and acted upon by that mining community for such a length of time, should not be adjudged wholly a mistake and put entirely aside because of difficulties in the application of some minor provisions to the peculiarities of this vein or deposit. With this explanation of the reasons for the long delay in the decision of this case, we pass to the special matters in controversy.

The questions presented by the pleadings to be tried were, whether there was a vein or lode within the territorial boundaries of the placer; and if so, whether it was a known vein or lode within the meaning of section 2333. The plaintiff, to maintain its case, offered in evidence simply its patent and other matters of record, together with parol proof of bounda-

ries. By this record evidence it appeared that the application for the placer patent was made on the 13th of November, 1878; that entry and payment were on the 21st of February, 1879; and that the patent was issued on January 30, 1880. The location certificate of the Goodell lode was dated March 10 and recorded March 11, 1879, reciting a location on February 1, 1879. After the introduction of this testimony the plaintiff rested, and by it a *prima facie* title to the whole placer claim was established. The location of the Goodell lode was some months after the application for the placer patent. The defendant, to maintain its claim, offered the testimony of several witnesses, testimony which established beyond any doubt that in 1877, and more than a year before any proceedings were initiated with reference to the placer patent, the grantors of defendant entered upon and ran a tunnel some 400 feet in length into and through that ground which afterwards was patented as the placer tract; and that in running such tunnel they intersected and crossed three veins, one of which was thereafter, and in 1879, located as the Goodell vein or lode. The vein thus crossed and disclosed by the tunnel was from seventy-five to seventy-eight feet from its mouth, of about fifteen inches in width, with distinct walls of porphyry on either side, a vein whose existence was obvious to even a casual inspection by any one passing through the tunnel.

With this general statement, we notice the two or three matters which are the special objects of contention; and, first, it is said that the court erred in giving this instruction:

"If there was a lode in that territory, and it was known to Moyer as an existing lode at this time — and by this time I mean the first of February, 1879, or at the time these locations were said to have been made — and the lode had been previously discovered by the locators of these claims, then the placer patent is not sufficient to convey them. In other words, they are excepted by the terms of this statute from the provisions of the patent, and the owners of that title now have no right to them."

In other words, the court ruled that if the vein was

known to the placer patentee at or before entry and payment, although not known at the time of the application for patent, it was excepted from the property conveyed by the patent. Into this ruling the court was doubtless led by the language of the patent, which in terms exempts all veins or lodes known to exist at the date thereof; that is, the date of the issue of the patent. In this respect there was error. The time at which the vein or lode within the placer must be known in order to be excepted from the grant of the patent is, by section 2333, the time at which the application is made. Its language is: "An application for a patent for such placer claim, which does not include an application for the vein or lode claim, shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim." *Iron Silver Mining Co.* v. *Reynolds*, 124 U. S. 374; *United States* v. *Iron Silver Mining Co.*, 128 U. S. 673, 680. There was therefore a technical error in this instruction of the court; but one which obviously wrought no injury to the substantial rights of the plaintiff, because there is not a scintilla of testimony, a suggestion even, that between the year 1877 and the time of entry and payment there was any work done or discovery made on the placer ground in respect to the Goodell lode or in the tunnel. Everything that was done had been done in 1877; everything that was known at the time of the patent was known in 1877; so that the error of date in the charge was one not affecting the substantial rights of the plaintiff. If at the time of the entry there was a known vein, there was the same vein and the same knowledge in 1877, and before the application.

The second matter is this: Was there a known vein at the time of the application for a patent, within the meaning of section 2333? It was not then a located vein or lode, and the case was evidently tried by the plaintiff upon the theory that unless it was a located vein it was not a known vein, but that, as we have seen, is not a correct interpretation of the statute. It is enough that it be known, and in this respect, to come within the intent of the statute, it must either have been known to the applicant for the placer patent or known to the

community generally, or else disclosed by workings and obvious to any one making a reasonable and fair inspection of the premises for the purpose of obtaining title from the government. The proof abundantly establishes that within the last description the vein was a known vein. The placer tract was a small one of fifty-six acres. The tunnel ran 400 feet underneath its surface. At its mouth there was a large dump of earth taken from it. No one had a right to enter that ground as placer mining ground, unless he had made such an inspection as to enable him to make affidavit that it was adapted to such mining. No examination could have been made without disclosing the existence of this tunnel. That was a fact upon the surface, obvious to the most casual inspection. No one could be heard to say that he had examined that ground in order to ascertain that it was suitable for placer mining, and in such examination had not discovered the existence of this tunnel. It was not a little excavation, with a few shovelfuls of dirt at its entrance. The pile of dirt was evidence which no one could ignore, that it was a long tunnel, running far into the earth. It was in mining ground, as all this territory was believed to be, and, therefore, an excavation likely to disclose veins. As an applicant for a placer patent was chargeable with notice of the existence of the tunnel, so, also, was he chargeable with notice of whatever a casual inspection of that tunnel would disclose. He would not be heard to say, I did not enter and examine this tunnel, and, therefore, know nothing of the veins apparent in it. The government does not permit a person to thus shut his eyes and buy. If there be a vein or lode within the ground, it is entitled to double price per acre for it and the adjacent fifty feet, and, with such interest in the price to be paid, it rightfully holds any applicant for a placer patent chargeable with all that would be disclosed by a casual inspection of the surface of the ground or of such a tunnel. The applicant must be adjudged to have known that which others knew, and which he would have ascertained if he had discharged fairly his duty to the government. Surely under the testimony the jury was warranted in finding that this was a known vein.

Another question is, whether this was such a vein bearing gold, silver, cinnabar, lead or other valuable deposit as that a discoverer could obtain title thereto under sections 2320 and 2325. It is undoubtedly true, that not every crevice in the rocks, nor every outcropping on the surface, which suggests the possibility of mineral, or which may, on subsequent exploration, be found to develop ore of great value, can be adjudged a known vein or lode within the meaning of the statute. As said by this court in the case of *United States* v. *Iron Silver Mining Co.*, 128 U. S. 673, 683: "It is not enough that there may have been some indications by outcroppings on the surface, of the existence of lodes or veins of rock in place bearing gold or silver or other metal, to justify their designation as 'known' veins or lodes. To meet that designation the lodes or veins must be clearly ascertained, and be of such extent as to render the land more valuable on that account, and justify their exploitation." And, yet, in the case of *Iron Silver Mining Co.* v. *Cheesman*, 116 U. S. 529, 536, this court sustained an instruction as to what constitutes a lode or vein, given in these words: "To determine whether a lode or vein exists, it is necessary to define those terms; and, as to that, it is enough to say that a lode or vein is a body of mineral, or mineral-bearing rock, within defined boundaries in the general mass of the mountain. In this definition the elements are the body of mineral or mineral-bearing rock and the boundaries; with either of these things well established, very slight evidence may be accepted as to the existence of the other. A body of mineral or mineral-bearing rock in the general mass of the mountain, so far as it may continue unbroken and without interruption, may be regarded as a lode, whatever the boundaries may be. In the existence of such body, and to the extent of it, boundaries are implied. On the other hand, with well-defined boundaries, very slight evidence of ore within such boundaries will prove the existence of a lode. Such boundaries constitute a fissure, and if in such fissure ore is found, although at considerable intervals and in small quantities, it is called a lode or vein."

It is, after all, a question of fact for a jury. It cannot be

said, as a matter of law in advance, how much of gold or silver must be found in a vein before it will justify exploitation and be properly called a "known" vein. In this case the only testimony offered upon this question was that by the defendant. John Hayes, one of the parties who dug this tunnel, testified that his brother was the territorial assayer of Colorado at the time; and that he assayed the ore from this vein several times, and got from a trace to three-quarters of an ounce of gold. Three-quarters of an ounce would be fifteen dollars a ton. That of itself may not be decisive as to whether the vein justified exploitation. And yet the proofs filed in the Land Department, under which the patent to this entire placer claim was obtained, show no such amount of mineral. What is sufficient to obtain title from the government is certainly sufficient to demand consideration by a jury. We are told by counsel for defendant that the Father de Smet mine at Deadwood produces ore that runs less than five dollars to the ton, yet is of immense value and constantly worked, because of the large quantity of this low-grade ore. So, here, the amount of the ore, the facility for reaching and working it, as well as the product per ton, are all to be considered in determining whether the vein is one which justified exploitation and working. Beyond this the defendant produced Fred. G. Bulkley, a civil and mining engineer, who testified to an examination of the tunnel describing the various fissures and veins, and produced before the jury some of the ore taken from this vein. The jury, therefore, had before them samples of the ore from the vein, they were advised as to its dimensions, as to its general course and direction, and as to the actual results of several assays, and upon this testimony they found that it was a known vein.

If it be said that the conduct of the parties who ran the tunnel makes against the present contention, in that when they reached this vein they did not stop and develop it, but on the contrary proceeded with the tunnel, and even after they had finished their work therein did not immediately commence to develop it, a satisfactory answer is found in the testimony. It appears that there was a prevalent belief that a rich blanket

vein was underlying the entire country, and this was the object of pursuit by all. The placer claim of the plaintiff was evidently not taken for placer mining, but because outside, and at a short distance therefrom, it had workings on this blanket vein; and believing that such vein at a slight dip extended under the placer ground, title was sought to the latter in order to prevent intrusion upon the former. In like manner they who ran the tunnel, having a claim on adjacent ground, were seeking the same blanket vein, which, wherever reached, had been found of great thickness and richness. All minor matters and less promising veins were subordinated to the search for this one rich vein. The conduct of the grantors of both of the parties was determined by a belief in the existence of this underlying vein; but whether their belief in its existence was well founded or not, whether their conduct in view of such belief was wise or not, are matters which do not detract from the credibility to be given to the testimony as to the width and character of this vein. We are of opinion, therefore, that the finding of the jury that this was a "known" vein within the scope of section 2333 was based upon sufficient testimony, and cannot be disturbed.

It is urged that there was error in admitting testimony as to this belief in an underlying vein, because the jury may have found against the plaintiff on the ground of the supposed existence of such a vein. It may have been competent as explanatory of the conduct of the parties, as indicated above; but whether this be so or not, the attention of the jury was directed by the court to the vein disclosed by the tunnel as the known vein upon which the rights of defendant rested. It made no reference to this supposed underlying vein, but did say:

"The evidence tends to prove that the discovery of mineral in these claims was made in a tunnel some time in 1877, I believe. The locations were not made on the surface of the ground until 1879, about the first of February. That was after the application for patent and before the entry, which was about the 21st of February, 1879, and, of course, before the patent was issued.

"If there was a lode in that territory, and it was known to

Moyer as an existing lode at this time — and by this time I mean the first of February, 1879, or at the time these locations were said to have been made — and the lode had been previously discovered by the locators of these claims, then the placer patent is not sufficient to convey them."

And then, in closing the charge, it added:

"I think that is all, gentlemen, that there is in the case. I do not know that it is necessary to repeat it again — that the plaintiff's title must prevail unless it appears to you from the evidence that there was a lode existing in the ground, and that Moyer knew it at the time of making his entry and obtaining his patent, and that a location had been made upon it in a general way; that there was a certificate made; that there was a discovery of mineral within the claims; and that the lode was staked upon the surface and the like."

As there was no pretence of any discovery of this supposed underlying vein, obviously the attention of the jury was directed solely to the vein disclosed in the tunnel.

These are all the questions we deem important, and in the record there appears no substantial error. The judgment will therefore be

Affirmed.

MR. JUSTICE FIELD, with whom concurred MR. JUSTICE HARLAN, and MR. JUSTICE BROWN, dissenting.

I am unable to agree with my associates in the disposal of this case. The decision, and the opinion upon which it is founded, will do much, in my judgment, to weaken the security of patents of the United States for mineral lands, and leave them open to attack and overthrow upon mere surmises, notions, and loose gossip of the neighborhood which ought not to interfere with any rights of property resting upon the solemn record of the government.

The Iron Silver Mining Company, the plaintiff below and the plaintiff in error here, is a corporation created under the laws of New York, and the defendant, the Mike and Starr Gold and Silver Mining Company, is a corporation also created

under the laws of that State. The present action is in form one to recover an alleged mining lode claim a little over ten acres in extent, lying within the boundaries of a placer claim known as the William Moyer placer claim, of which the plaintiff is the owner; but it is in fact an action to determine the right of the defendant to a patent of the United States for that lode under proceedings taken in assumed conformity with section 2326 of the Revised Statutes. It was commenced in a District Court of Colorado, and on application of the plaintiff was removed to the Circuit Court of the United States.

The placer claim embraces fifty-six acres and a fraction of an acre, a full description of which, by metes and bounds, is given in the complaint. It is designated and known in the public surveys of mineral land as lot No. 300. A patent of the United States for it was issued to William Moyer on the 30th of January, 1880. The application for the patent was filed in the local land office on the 13th of November, 1878, and the claim was entered for patent and paid for on the 1st day of February, 1879.

The patent contains several express reservations or conditions, among them these two: — we quote their language from the instrument:

"First. That the grant hereby made is restricted in its exterior limits to the boundaries of the said lot No. 300, as hereinbefore described, and to any veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits which may hereafter be discovered within said limits, and which are not claimed or known to exist at the date hereof.

"Second. That should any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits, be claimed or known to exist within the above-described premises at the date hereof, the same is expressly excepted and excluded from these presents."

The patentee, Moyer, on the 24th of February, 1880, executed a quit claim deed of the premises to William H. Stevens and Levi Z. Leiter; and on the 6th of March following these

parties conveyed the same to the plaintiff, and by its direction and at its cost, large and expensive works were subsequently erected on the premises for the development of the mine and the extraction of the precious metals.

The defendant in answer to the action, besides denying the right of the plaintiff to the possession of the premises, relies upon two defences — the acquisition of a lode claim known as the Goodell lode from the original locators, and the acquisition of a lode claim known as the Thomas Starr lode. In stating the first defence it recites the exceptions stated to the patent, and sets up "that at the time of the location of said placer claim, and the survey thereof, and at the time of the application for patent, and at the time of the entry of said land thereunder, and at the date of the issuance and granting of said patent, a lode, vein, and deposit of mineral, of quartz and other rock in place, carrying carbonates of lead and silver, was known to exist and was claimed within the boundaries of said William Moyer placer claim, survey No. 300, and that the fact that said vein was claimed and did exist within said premises was known to the said William Moyer, the patentee of said claim, at all the times hereinbefore mentioned;" that said vein was known and claimed as the Goodell lode; and that on the first day of February, A.D. 1879, Maurice Hayes, John Hayes, George C. Gardner, and R. E. Goodell, then citizens of the United States, went upon the premises and sunk a shaft and run a tunnel therein, which uncovered and exposed said vein, lode, and deposit; that they thereupon proceeded to locate the same as a lode claim, by putting up a notice containing the name of the lode, the date of the location, and their own names as locators, and marked the surface boundaries by posts and afterwards caused a location certificate to be filed in the office of the clerk and recorder of the county, containing the name of the location, the names of the locators, the date of location, and the number of feet claimed in length on each side of the centre of the discovery shaft; whereby the said locators became the owners of and entitled to the possession of said lode, the title to which afterwards by several mesne conveyances became vested in the defendant.

In stating the second defence the defendant sets up that the claim upon which it is now at work is a well defined vein of quartz bearing silver and other valuable metals and that the same was discovered by Maurice Hayes, John Hayes and Thomas Starr, on the 9th of November, 1877, and immediately afterwards, on the discovery of the lode, the locators caused a shaft to be sunk to the depth of more than ten feet below the surface, and within three months thereafter located the same by marking the boundaries with substantial stakes, and by filing in the office of the clerk and recorder of the county, in which the claim is situated, a certificate of its location, containing the name of the lode, the names of the locators, the date of location, the number of feet in length claimed on each side of the centre of the discovery shaft, and the general course and direction of the claim, and that in said location certificate and upon the location stake the same was called the Thomas Starr lode, and that afterwards by various mesne conveyances the property became vested in the defendant. No evidence was offered on the trial with reference to this Thomas Starr lode set up in the second defence, and no certificate of its location was produced; it may, therefore, be considered as out of the case. The controversy relates only to the Goodell lode claim set up in the first defence. The location certificate of this lode claim bears date on the 10th day of March, 1879, and recites that the claim was located on the 1st of February, 1879. The averment that its original locators, on the 1st of February, 1879, went upon the premises and sunk a shaft and ran a tunnel thereon, which uncovered and exposed the vein, lode and deposit, and that they thereupon proceeded to locate the same, was not supported by the evidence produced. The location of the claim was not preceded by the discovery of the existence of the precious metals within it. The statute of the United States, respecting mining claims upon veins or lodes of quartz or other rock in place, bearing gold and silver, declares that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." Rev. Stat. sec. 2320. One of the locators, John Hayes, was examined as a witness, and testified that he helped the

surveyor to survey the lode claims — the Goodell and Gardner claims — and drive down the stakes; that afterwards he filed the certificate of location; that he knew the discovery shafts of the claims, and had been in them; that there was no discovery of any vein or lode of valuable mineral deposits within them; and that those shafts were sunk in 1879. And the tunnel alleged to have been then run was commenced and completed years before.

On the 11th of March, 1879, the locators filed with the county clerk and recorder of Lake County — the county within which the alleged lode lies — a location certificate of the lode claim, and on the 13th of April, 1881, the defendant, which had succeeded to their interest, made application for a patent for the same. The plaintiff below and in this court, the Iron Silver Mining Company, filed in the land office its adverse claim to the application for a patent under assumed conformity with the provisions of section 2325 of the Revised Statutes, and this action is brought by that company to determine, as between the parties, the right to the possession of the land embracing this alleged lode in pursuance of section 2326. The case was tried before a jury, and the only direct evidence offered to show the existence of a known vein or lode bearing gold or silver within the placer claim was contained in the testimony as to the tunnel run, called the Mike tunnel, and discoveries made in it. It was shown that the tunnel was commenced in January, 1877, and completed on the 24th of April following. It extended 400 feet, but it disclosed within it only veins of decomposed porphyry and manganese iron. The statement that it intersected and crossed three veins is only correct in that they were veins of that character. There was no vein or lode of gold or silver bearing rock found in the tunnel, and there is an erroneous impression conveyed by the opinion of the court in that respect. The material evidence in the record as to what was found in the tunnel is given in the note below from which it will appear, as stated above, that only veins of decomposed porphyry and manganese iron were found there. No gold or silver was discovered in it, except in one instance, and then merely a

trace of gold at about seventy-five feet from the mouth of the tunnel, from which only three-quarters of an ounce was obtained. This discovery did not establish the existence "of a lode, vein or deposit of mineral in quartz or other rock in place carrying carbonates of lead and silver," as averred in the answer of the defendant. It did not of itself constitute a vein or lode in gold or silver bearing rock; it was loose gold and was not sufficient, of itself, to induce further work upon the tunnel, or even to lead to a location of a mining claim in it. From the completion of the tunnel up to the time when this case was on trial, extending over eight years and a half, no work was done upon the tunnel, nor was any attempt made to use it, or to develop any pretended mine in it. By the law there must have been a location upon the vein in it, if there was one, before any right to such vein could be initiated; and had such location been made, the right thus acquired was lost and forfeited by abandonment years before this action was commenced. But as I shall show hereafter, the mere indication or presence of gold or silver is not sufficient to establish the existence of a lode. The mineral must exist in such quantities as to justify expenditure of money for the development of the mine and the extraction of the mineral. It would create surprise among miners to be told that if a trace of loose gold, such as is shown here, was found at any one spot in a tunnel leading to a placer claim, it would establish the existence of a vein or lode in the placer claim, and form the basis of a proceeding to despoil a purchaser from the patentee, years after the purchase, of a large portion of its mining property.

Evidence was also offered against the objection of the plaintiff to show that there were other lodes in the vicinity of the placer claim of the plaintiff and also of the placer claim of Wells and Moyer; and also that parties in the neighborhood *believed* — not that they knew — that there was a vein or lode lying under those placer claims, and also of conversations in 1877 with one Stevens, who acquired his interest by purchase with one Leiter from the patentee more than a year after the patent was issued, as to his opinion of the existence of mineral

at a place where he had at the time men at work, and "*underlying all the ground there;*" but it was not shown that the place thus loosely designated embraced the premises in controversy.[1]

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[1] NOTE. — There were four witnesses examined as to what was found in the Mike tunnel. All that is important in their testimony bearing upon that point is here given.

1. *Baldwin.*

Mr. Baldwin examined the Mike tunnel with reference to whether there was a vein disclosed in it, and testified that there were several veins exposed in the course of the tunnel; that at a point about seventy-five feet in from the mouth, was disclosed a lode with porphyry walls, or, at least, a porphyry wall on the west side, dipping to the east, and a vein showing decomposed porphyry with some pieces of iron at different points in the lode, and that there were other lodes found further in the tunnel, but that he never was in the tunnel until about a month before giving his testimony.

2. *Morris.*

Mr. Morris knew the Mike tunnel, and that there were discoveries of lodes in that tunnel, three, he guessed, and testified as to the character of the filling of the largest vein, that it was decomposed porphyry, and manganese iron, and did not know whether it ever carried any mineral or not, of his own knowledge; that the second vein was about seventy or eighty feet from the first one; and being asked what was found in the vein that indicated that it was a vein — what kind of mineral — answered decomposed porphyry and soft material — some iron.

3. *Hayes.*

Mr. Hayes testified that he discovered in the Mike tunnel a vein; that he struck the pick into it himself, about the 15th or 16th of February, 1877, about seventy-five feet from its mouth; that it was about eighteen inches wide, and was decomposed quartz and a clay and vein matter; that he got several colors of gold in it, and his brother, who was the territorial assayer of Colorado at that time — but dead now — had it assayed several times, and he got from a trace to three-quarters of an ounce of gold in it. He also testified that four veins were discovered — the one nearest was about two hundred feet from the mouth of the tunnel — and, in answer to the question what kind of vein it was, said: It is similar to the first one. Well, the first one is more decomposed, the porphyry, the walls of it; this last one we have got here is what we call block porphyry — more solid porphyry.

On cross-examination he said it was a vein existing in the porphyry — decomposed matter between porphyry, decomposed quartz and shale.

At the close of the testimony in the case the plaintiff moved the court to instruct the jury to find a verdict in its favor, on the grounds, among others, that the Goodell claim of the defendant was not located or recorded until after the application was made for the patent of the William Moyer placer claim, and that there had not been a discovery in the shafts of the defendant of any vein or lode of quartz or other rock in place bearing any valuable deposits. But the court denied this motion, and to its denial exception was taken.

Among the instructions to the jury the plaintiff then requested the court to give the following:

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4. *Fred G. Bulkley.*

Mr. Bulkley testified as to an examination of the Mike tunnel. He said: "The first material which the tunnel encounters as it passes into the hill is a loose wash and gravel, that extends for a distance of about twenty-five feet to thirty feet, and the next material encountered is white rock, or rather rock the surface of which has about the same slope as the surface of the hill. The rock that is first encountered is porphyry, and it is rather shattered and somewhat soft, and as depth is gained it gains a hardness until — at the depth of 78 feet it is found to be hard and in place, or, in fact, before reaching that point, but unquestionably so at the point 78 feet from the mouth of the tunnel. . . . Lying upon the foot-wall there is a streak of clay which is perfectly continuous, so far as the developments show. That clay is from an inch to six inches thick; it is hard, leathery clay, and one can catch hold of a projecting portion and pull it down as one would the bark from a tree. It is hard and tough. Next to that there is a mixed mass of iron-stained porphyry and clay, the iron having a thickness of from eight to twelve or fourteen inches. Next to that, as shown by the red mark in the sketch of which I am speaking, is a band of iron at a thickness of from two to six or eight inches."

Cross-Examination.

Q. Mr. Bulkley, what kind of a vein is that that you have described in the tunnel? — A. I haven't described it as a vein. In speaking of it I used the term vein inadvertently once, because, while it possesses such characteristics of a vein as will be determined upon inspection, other characteristics, I think, would have to be determined by analysis. For instance, it has the general indication of lateral extent and extent in depth — that is, it has a very considerable lateral extent in the direction of the strike and dip. The material which is enclosed in it — I have brought a piece with me — it looks very much as though it would carry silver, and possibly some gold, but to speak positively upon that point is more than I can do. I venture to say it looks like it, and most any miner will agree with me.

Dissenting Opinion: Field, Harlan, Brown, JJ.

1. That the terms "vein or lode" and "vein or lode claim," as used in section 2333 of the Revised Statutes of the United States, mean and refer to vein or lode mining claims which have been discovered, located and recorded within the boundaries of a placer claim before the time when the application is made for the placer patent. And unless the jury find from the evidence that the alleged Goodell lode claim of defendant had been discovered, located, and recorded in accordance with the law governing the location and acquiring title to mining claims before the time when the application was made for the said placer patent, the said lode claim is not excepted or excluded from the grant of the said placer patent, and does not come within the reservation clause in said patent.

2. That a lode claim located or attempted to be located within the exterior boundaries of a placer claim at any time after the time of making the application for patent to the placer claim gives no right or title; any lode so located is not reserved from the grant of the placer patent. This rule applies to all lode claims located between the time of the application for the placer patent and the making of the entry and the issuing of the patent.

3. That to constitute a valid title to a lode mining claim the locators of such claim are required to make a discovery of a vein, lode or ledge carrying valuable deposits, within the boundaries of such lode claim, before the same is located and recorded, and if such discovery is not made the location is void and creates no title or right of possession in the attempted locators; and if the said defendants made no such discovery of a vein, or lode, or valuable deposit within the boundaries of the said Goodell lode claim, then they acquired no title or right to possession whatever by virtue of their pretended location.

But the court refused to give either of these instructions, and to its refusal to each one an exception was taken at the time.

The jury found for the defendant. To reverse the judgment entered upon its verdict the case was brought to this court on writ of error.

Dissenting Opinion: Field, Harlan, Brown, JJ.

The contention between the parties to this action is as to which of them is entitled to the possession of the land embracing the alleged lode claimed by the defendant. In the case of the same plaintiff against Campbell and others, recently decided, (135 U. S. 286,) it was held that to an application for a patent for a lode claim within the boundaries of a patented placer claim, the holder of the patent was not bound under the statute to interpose any objections he might have; that such objections were required only from parties seeking a right to a patent as against the lode claimant, and not from one who already had a patent. But before that decision was made the plaintiff here had interposed objections to the application of the lode claimant, setting up his adverse claim to the premises under the placer patent; and the present action has followed that proceeding, the plaintiff supposing that it was bound, in order to protect its rights, to interpose and set up its adverse claim.

Assuming that the plaintiff is thereby estopped from denying its obligation to contest the right of the lode claimant in this way — which may well be doubted — I proceed to consider the questions presented for a reversal of the judgment obtained.

The presumption in favor of its validity attends the placer patent, as it does all patents of the government of any interest in the public lands, which they purport to convey. So potential and efficacious is such presumption that it has been frequently held by this court, that if under any circumstances in the case the patent might have been rightfully issued, it will be presumed as against any collateral attack, that such circumstances existed. *Smelting Mining Co.* v. *Kemp*, 104 U. S. 636, 646. As was said by the Circuit Court in the *Eureka Case*, a patent for a mining claim is iron-clad in its potency against all mere speculative inferences. 4 Sawyer, 302. The burden of proof therefore rested upon the defendant to show affirmatively that it was entitled, as against that patent, to the possession of the lode claim, on the ground that the lode was excepted from the patent in express terms.

A lode claim of the same richness as a placer claim is of

much greater value than the difference in price per acre fixed by the government. By the depth to which such a lode usually extends a much larger quantity of mineral is obtained from it than from a placer claim covering the same extent of surface ground; it is, therefore, as a general rule, far more remunerative. As the lode claim of the defendants in this case embraces a little over ten acres, it is difficult to believe that the applicant for a placer claim embracing it, if it was known to exist at the time, would have neglected to apply for it, when it could have been obtained at the trifling expense of twenty-six dollars. The possibility of others invading the placer boundaries, if within them there was a known vein or lode, would naturally have been the occasion of much uneasiness to the owners of the placer claim, to avoid which we may well suppose they would readily have incurred expenses vastly above the government price of the lode claim. Clear and convincing proof would seem, therefore, to be necessary to overcome the presumption thus arising, that the applicant for the placer patent did not know at the time of the existence of any such lode. Especially would this seem to be required where, as in the present case, knowledge of such lode by the patentee is averred only after the mine patented has passed into other hands, and extensive explorations have been made and large expenditures incurred in developing it, in supposed possession of the title to the entire property.

The exceptions to the operation of the patent are founded upon section 2333 of the Revised Statutes, which is as follows:

"Where the same person, association or corporation is in possession of a placer claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer claim, or any placer claim not embracing any vein or lode claim, shall be

paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section twenty-three hundred and twenty, is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof."

This section, as we have said on more than one occasion, makes provision for three distinct classes of cases:

1. Where one applies for a placer patent, who is at the time in the possession of a vein or lode included within its boundaries, he must state the fact, and then, on payment of the sum required for a vein or lode claim and twenty-five feet on each side of it at $5.00 per acre, and $2.50 an acre for the placer claim, a patent will issue to him covering both claim and vein or lode.

2. Where a vein or lode such as is described in a previous section of the Revised Statutes — that is, of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits — is known to exist at the time within the boundaries of the placer claim, the application for a patent therefor, which does not also include an application for the vein or lode, will be construed as a conclusive declaration that the claimant of the placer claim has no right of possession to the vein or lode.

3. Where the existence of a vein or lode in a placer claim is not known at the time of the application for a patent, that instrument will convey all valuable mineral and other deposits within its boundaries. *Iron Silver Mining Co.* v. *Reynolds*, 124 U. S. 374, 382; also *Reynolds* v. *Iron Silver Mining Co.*, 116 U. S. 687, 696.

In *Iron Silver Mining Co.* v. *Reynolds*, 116 U. S. 687, 692, the court, after stating the substance of this section, added

that it was not easy to define the words "known to exist" in the act, stating that it was not necessary to inquire in that case whether this knowledge must be traced to the applicant for the patent or whether it was sufficient that the existence of the lode was generally known; and what kind of evidence was necessary to prove this knowledge, and observing that it was perhaps better that these questions should be decided as they arose. They did not arise there because the court took the evidence from the jury on the ground that the defendants were trespassers.

When the same case was again before the court at October term 1887, it was expressly held that the statute did not except veins or lodes "*claimed* or known to exist" at the date of the patent, but only such as were "known to exist," and that it fixed the time at which such knowledge was to be had as that of the application for the patent. *Iron Silver Mining Co.* v. *Reynolds*, 124 U. S. 374, 382. The same doctrine was declared in *United States* v. *Silver Mining Co.*, 128 U. S. 673, 680.

To bring, therefore, a vein or lode of quartz or other rock in place bearing precious metals within the exceptions of the statute, and of course within those of the patent to the extent to which they are operative, the vein or lode, according to the decisions referred to, must have been *known to exist at the time application was made for the patent.* The applicant could not, of course, speak of discoveries not then made; necessarily, his knowledge must have been limited to the time of his application. The court below, however, held that it was sufficient if the lode in controversy was known to exist at the date of the patent, and not at the date of the application for it. It stated expressly that it would not enter into any consideration of the validity of the exceptions made in the patent, whether they conformed to the statute or not, but would follow the patent, and so ruled during the whole trial, both in the admission of testimony and in the instructions to the jury, giving them to understand in the most explicit terms that if a lode was discovered and a location made before the issue of the patent for a placer claim, that lode was excepted from

the patent, although such discovery and location were made subsequent to the application for the patent.

In thus holding there was a plain departure from the express and repeated decisions of this court, for which error alone the judgment ought to be reversed. The ruling could not have failed to mislead the jury, and to direct their attention to matters not properly open for their consideration. But independently of this error, there were material objections to evidence admitted on the trial to establish the existence of the supposed lode even upon the theory of the court below as to the time when such existence must have been known, and to its instructions upon portions of such evidence, and to its refusal to order a verdict for the plaintiff upon the grounds stated.

At the outset of this case it becomes important to determine what is meant by a "*known* lode" within the purview of the statute, which, if not applied for by the patentee, is excepted from the patent; and also when a right to such a lode is initiated by a claimant, and to that consideration I will now direct attention. And first, what is meant by a lode or vein of quartz or other rock in place bearing gold or silver? The first reported case in which a definition was attempted is the *Eureka Case*, 4 Sawyer, 302, 311. The court, after observing that the word was not always used in the same sense in scientific works on geology and mineralogy, and by those actually engaged in the working of mines, said: "It is difficult to give any definition of the term as understood and used in the acts of Congress which will not be subject to criticism. A fissure in the earth's crust, an opening in its rocks and strata made by some force of nature, in which the mineral is deposited, would seem to be essential to the definition of a lode in the judgment of geologists. But, to the practical miner, the fissure and its walls are only of importance as indicating the boundaries within which he may look for and reasonably expect to find the ore he seeks. A continuous body of mineralized rock, lying within any other well-defined boundaries on the earth's surface and under it, would equally constitute, in his eyes, a lode. We are of opinion, therefore,

that the term, as used in the acts of Congress, is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rocks." And this court in *Iron Silver Mining Co.* v. *Cheesman*, 116 U. S. 529, 534, followed this citation by observing: "This definition has received repeated commendation in other cases, especially in *Stevens* v. *Williams*, 1 McCrary, 480, 488, where a shorter definition by Judge Hallett, of the Colorado Circuit Court, is also approved, to wit: 'In general it may be said that a lode or vein is a body of mineral, or mineral body of rock, within defined boundaries, in the general mass of the mountain.'" To constitute, therefore, a known lode, within the meaning of the statute, a belt or zone of mineralized rock lying within boundaries clearly separating it from the neighboring rock, must not only be ascertained, but must be so far developed or defined as to be capable of measurement. A right to a lode can only be initiated by location, and the statute declares that no location can be made until the discovery of a lode or vein bearing metal. And to embrace the lode within the patent of a placer claim the applicant must, if it be known, pay for it at the rate of five dollars per acre. But he cannot pay any sum, or offer to pay so as to be effectual, until he can ascertain the number of acres contained in the lode claim desired, that is, until the ground can be measured. Nor could the officers of the land department accept any sum from the applicant until such measurement, upon a mere speculative opinion as to the extent of the supposed lode. In *Sullivan* v. *Iron Silver Mining Co.*, 109 U. S. 550, this question was considered by the Circuit Court, but was not passed upon by this court, it not being deemed to necessarily arise on the pleadings. The plaintiff in that case had brought an action upon a patent for a placer claim. The defendant had located within it a lode claim after the patent was issued, and he set up in defence that the lode was known to the patentee at the time of the application for the patent, and not having been embraced in it was by the statute excluded from the patent. The plaintiff demurred to this answer, and the court held it was insufficient in not averring that the lode had been dis-

covered and located or recorded at the time of the application. But this court, without passing upon the necessity of such location or record, held that as a matter of pleading it was sufficient to aver that the lode was known to exist by the patentee at the time of his application for a patent, and was not included in his application, observing that, by the elementary rules of pleading, facts may be pleaded according to their legal effect, without setting forth the particulars that lead to it. The question as to what constitutes a known lode remained, therefore, unaffected by that decision.

For the reasons stated above it would seem that not merely must a discovery of mineral be made to constitute a known lode within the meaning of the statute, but that such development of its extent must be made as to enable the applicant to comply with the law in tendering the requisite price. The Circuit Judge, Mr. McCrary, who rendered the judgment of the Circuit Court, thus reversed on a point of pleading, felt that the construction placed by him upon the statute was the only one which made it consistent with itself or practicable in application.

"The first thing," he observes, "that strikes us as important in the construction of this language [of section 2323] is that we are referred back to section 2320 for a description of the vein or lode which is referred to, and which is not to pass to the patentee, unless he has complied with this provision of the statute: 'Where a vein or lode, such as is described in section 2320.' What sort of vein or lode is described in section 2320?

"By reference to that section, we see that it relates entirely to vein or lode claims, and the description which it contains is a description of the metes and bounds of a vein or lode claim, . . . not the lode simply, but a lode claim; one that has been located, which has boundaries, which has been developed; it gives us its dimensions; it declares it shall have been located; it says it shall be a claim in which there has been a discovery of mineral, etc.

"I am of the opinion that a vein or lode that has never been claimed, that has not been located, that has not been

marked out by metes and bounds, and in which there has been no actual development, or, to use the language of the statute, 'discovery of a vein or lode within the limits of the claim located,' is not a vein or lode such as is described in section 2320. The description must refer to these things; the section describes nothing else, and to its description we are plainly referred. It follows that the language . . . must refer to a vein or lode which has been located, which has boundaries, which has a locality, which has had some sort of development, or else it cannot be such a vein or lode as is described in section 2320." 5 McCrary, 274, 277, 278.

The case of *Noyes* v. *Mantle*, 127 U. S. 348, does not, when properly understood, militate, as supposed, against this view. The court in its language there used had reference to the rights of parties other than the applicant for the placer patent, when it said that the statute did not apply to lodes or veins within the boundaries of a placer claim which had been previously located under the laws of the United States, and were in the possession of the locators, and could apply only to lodes or veins not taken up and located so as to become the property of others. The statute has reference to cases where the same person, association or corporation is in possession both of the placer claim and of the vein or lode within its boundaries. In such cases, if the lode claim is known to the applicant to exist, he must designate it in his application; but it cannot, of course, be known to him to exist, whatever his conjectures may be, until the lode is discovered and located so as to enable him to state its existence and extent in his application for a patent of the placer claim, and to tender the price per acre required.

If there be any variance between these views and those expressed in *Iron Silver Mining Co.* v. *Reynolds*, 124 U. S. 374, 384, as to the manner in which knowledge of the existence of a lode within the boundaries of a placer claim may be obtained, it is because of a more careful consideration of the subject in later years than formerly, and of larger experience in mining cases.

As stated above, there can be no location of a lode or vein

until the discovery of precious metals in it has been had. And then it is not every vein or lode which may show traces of gold or silver that is exempted from sale or patent of the ground embracing it, but those only which possess these metals in such quantity as to enhance the value of the land and invite the expenditure of time and money for their development. No purpose or policy would be subserved by excepting from sale and patent veins and lodes yielding no remunerative return for labor expended upon them. Such exceptions would only be productive of embarrassment to the patentee, without any benefit to others. In a suit brought by the United States to cancel certain placer claims against the plaintiff in this case, alleging, among other things, that the patents were obtained by false and fraudulent representations, that the land contained no known veins or lodes of quartz or other rock in place bearing gold or silver or other metals, the court, speaking of the evidence in the case as insufficient to sustain the allegation, said: "It is not enough that there may have been some indications, by outcroppings on the surface, of the existence of lodes or veins of rock in place bearing gold or silver or other metal to justify their designation as 'known' veins or lodes. To meet that designation the lodes or veins must be clearly ascertained and be of such extent as to render the land more valuable on that account, and justify their exploitation." *United States* v. *Iron Silver Mining Co.*, 128 U. S. 673, 683. See to the same purport *Deffeback* v. *Hawke*, 115 U. S. 392, 404, and *Colorado Coal Co.* v. *United States*, 123 U. S. 307, 328.

In the case at bar, as stated above, the alleged location of the lode of the defendant was not preceded by the discovery of any precious metals within it. There was, therefore, in fact no lode to locate, and of course no location initiated or measurement possible. (Rev. Stat. 2320.) No weight ought to be given to a defence resting upon such a basis. The court below should have insisted upon proof of the discovery of mineral in the alleged lode claim of the defendant, or have directed a verdict as moved in favor of the plaintiff. And when the motion was refused, if the views I have expressed of

what constitutes a known lode within the meaning of the statute, and as to the knowledge of such lode at the time of the application for the patent, be correct, the instructions requested should have been given, and their refusal was error for which the judgment should be reversed.

Much of the evidence received at the trial was also subject to serious objections. To show that the alleged lode of the defendant was known to exist before the patent was issued, the court below allowed evidence, against the objection of the plaintiff, to be introduced, that there were other lodes in the vicinity of the placer claim of the plaintiff and also of the placer claim of Wells and Moyer; and also evidence that parties in the neighborhood believed that there was a vein or lode lying under those placer claims, and also evidence of conversations in 1877 with one Stevens, who only acquired his interest, by purchase with one Leiter, from the patentee more than a year after the patent was issued, as to his opinion of the existence of mineral *underlying all the ground* where he had men at work, although the ground thus loosely designated was not shown to have covered the premises in controversy.

1. At the outset of the trial the deposition of one Leonhardy was introduced in which he was allowed to testify in regard to lode claims located in the vicinity of the placer claim of the plaintiff and the placer claim of Wells and Moyer, against the objection of the plaintiff that the testimony was not competent or relevant. He stated that he knew of a "great many holes having been sunk there" between 1860 and 1880. And he referred to the claim of the Oro La Plata and to the Pennsylvania claim, and was allowed to give testimony as to the character of the dump of the former, and also of the underground workings of the latter, and of the kind of vein that it disclosed. He was also permitted to speak of adjoining mines, called the Rock and Dome mines, and how long he had known them, and of his examination of their workings. Testimony of the same general character, though less full in detail, in reference to the same and other claims in the vicinity of the placer claim, was given by other witnesses.

It would seem that the court below, in admitting evidence

respecting other lodes in the vicinity of the placer claims, went upon the idea that it would support the theory on which it was supposed the contention of the defendant would be made, that there was only one lode running through all the ground in the neighborhood of the placer claims, although no such theory was advanced in fact. The error of this course of procedure and its tendency to mislead the jury are manifest. The existence of a lode covering everything or running through the whole country was not a matter to be assumed or to be shown by evidence of the existence of different lodes in the vicinity of the placer claim. If such an extended lode existed, its existence was to be established as any other matter of fact in the case, by competent proof. There is no necessary connection between the existence of lodes outside of a placer claim and one in it. It is true there may be instances, or at least they may be supposed, where the general condition and developments of a mining lode adjoining a placer claim may establish the fact that a lode enters within such claim, as for example, where the working of the lode is up to the line of the placer claim, and the lode continues to the point of contact. One then can satisfy himself, by examination, of the penetration of the lode to some extent within the claim. But no such knowledge can come from the workings of lodes at a distance from a placer claim as in this case. It is a matter well known to persons at all familiar with mining for the precious metals that veins rich in gold and silver are generally found with barren rock within a few feet on each side of them, and that such veins more frequently than otherwise come abruptly to an end. No one thus familiar would feel justified in concluding from the mere distance or vicinity of other mines that they had any necessary connection with each other. In accordance with this doctrine, this court held, in *Dahl* v. *Raunheim*, 132 U. S. 260, 269, that the discovery by the defendant in that case of a lode two or three hundred feet outside of the boundaries of the placer claim in suit did not "create any presumption of the possession of a vein or lode within those boundaries, nor, we may add, that a vein or lode existed within them." The admission of the evidence in ques-

tion was well calculated to confuse the jury and mislead their judgment.

2. The witness Leonhardy was also allowed, against the objection of the plaintiff, to state that there was knowledge *among the people* in the vicinity of the placer claim of the plaintiff, at the times he visited the country, as to the existence of a vein or deposit of mineral underneath the claims. He testified that there was such knowledge at those times; that wherever they, the people, sunk, there they found mineral, without stating what or where people sunk or the character of their developments, the knowledge being evidently no more than an opinion or belief which parties in the vicinity had formed on the subject. The witness Reed was allowed to state that there was a general understanding that there was a vein under the placer claim. Of the inadmissibility of this kind of evidence to establish the existence of a valuable vein or lode of mineral and knowledge of it by the patentee on his application for the patent, it would seem there could be no question. The opinions and belief of the neighborhood do not show knowledge of the existence of a lode or vein of valuable mineral. On this point we have an express adjudication in the case of *Iron Silver Mining Co.* v. *Reynolds*, when it was here at October term, 1887, 124 U. S. 374, 384. It was there held that mere belief as to the existence of a valuable lode, founded even upon investigation as to the character of the ground, did not amount to knowledge under the statute. "The statute speaks," said the court, "of acquiring a patent with a knowledge of the existence of a vein or lode within the boundaries of the claim for which a patent is sought, not the effect of the intent of the party to acquire a lode which may or may not exist, of which he has no knowledge. Nor does it render belief, after examination, in the existence of a lode, knowledge of the fact. There may be difficulty in determining whether such knowledge in a given case was had, but between mere belief and knowledge there is a wide difference. The court could not make them synonymous by its charge and thus in effect incorporate new terms into the statute." Purchasers from a patentee holding the instrument of the

general government conveying to him fifty-six acres and a fraction of an acre of valuable mineral ground are not to be deprived years subsequent to their purchase of nearly one-fifth of it, or, indeed, any portion of it, because his neighbors at the time or subsequently residing near the premises believed that there was a vein or lode under the surface of his claim which he ought not to have. To sustain the admission of such beliefs or opinions in evidence against the patent would be to take from that instrument of the government all the peace and security which it is supposed to give to its possessor in the enjoyment of the property it transfers to him. An unlocated lode claim, existing only in the impressions and beliefs of neighbors or others, and not in knowledge founded upon discovery and exploration, does not seem to me to have any element of property or validity as a basis of a defence to proceedings to obtain a patent from the government.

3. The testimony received of conversations of the same witness with Stevens, as to the latter's opinion in 1887 of the existence of a large body of metal "underlying all the ground there," referring to ground where he had employed men to work, would seem to be subject to still greater objection, for it was not shown that the ground referred to embraced the premises in controversy. Leonhardy testified that in the spring of 1877 Stevens came to his house and told him that the country, referring to the ground upon which his men were at work, was good, the best mineral country he ever saw, but that if he told the men he had employed so, they would leave him as soon as they got there and go on their own hook; and again, that he had found an immense body of mineral underlying all that ground there, that he had shipped many tons which had paid him a handsome profit, and that he was going to secure the ground and begin very heavy operations. It does not appear, however, what operations he did commence, if any, or what interest he then had in the "ground there" beyond that of a prospector and explorer, or that he ever made any mining location himself, or acquired any title to any mines except by the purchase mentioned from the patentee. Nor does it appear that he possessed any special knowledge of the

character of the mines. He had only an impression and theory that the land was rich in mineral. Without making the many possible allowances admissible for inaccuracies and exaggerations of the witness respecting statements made eight years before, there is nothing in what Stevens is reported to have said to him of the mineral richness of the country that can possibly affect the validity of the patent of the government to the patentee, Moyer, of other and different land.

The only other testimony introduced to connect Stevens with the patentee, and to show that Moyer, the patentee, had knowledge of the existence of any lode before his application for the present patent, is that of the witness Norris, who said that Moyer, the patentee, told him, not stating the time or place, that he, Moyer, was going to get a placer patent for Mr. Stevens, who was afraid that miners would adverse him, and he wanted Moyer to get the patent for him, not mentioning of what land such patent was to be had. It subsequently appeared that this alleged conversation had reference to a different claim than that of Moyer — to that of Wells and Moyer. It would be a waste of time to argue that such statements, if made, do not even tend to prove any such knowledge of a lode within the claim, for a disregard of which in his application one-fifth of the rights acquired by the patent can be defeated, years after the patent has been issued, the property gone into the hands of third parties, who have put up extensive works, and incurred large expenditures in its development. Frail, indeed, would the support of a patent be if testimony to such vague and loose conversations of a party not interested in the land in controversy at the time as owner could be received to impair the title of a *bona fide* purchaser from the patentee of the government, as the plaintiff in this case was. And yet, referring to it, the court below instructed the jury that it tended to prove knowledge of the existence of a lode equally in Moyer, the patentee, as it did in Stevens, thus assuming that it did prove such knowledge by Stevens; that no distinction could be raised between them; and that if the jury found that the existence of a lode was known to Stevens, they might find upon the same evidence that it was known to Moyer, the patentee.

Dissenting Opinion: Field, Harlan, Brown, JJ.

The record in this case affords a good illustration of what may be expected if loose testimony of the character mentioned can be received upon a trial of this kind. It contains a mass of hearsay testimony, irrelevant gossip, geological impressions of the neighborhood, and loose recollections of miners of what had transpired years before or of what they believed to exist, all mingled together and admitted by the court as going to prove the existence of a lode and knowledge of its existence on the part of the placer applicant. If out of such materials a patentee can be deprived of his property years after the issue of a patent, that instrument will be worse than useless to him. It will prove a delusion and a snare, luring him on to large expenditures, only to make more complete his ultimate ruin. It will afford no security against mere surmises, suppositions and beliefs, but leave him to be overwhelmed by them.

In my opinion the judgment should be reversed and a new trial awarded.

On the 25th April, 1892, it was "Ordered by the court that the mandate in this cause be stayed; that notice be given to counsel for the defendant in error that an application for a rehearing has been made; and leave is hereby granted counsel on both sides to file printed briefs on or before the first day of the next term of this court upon the question whether a rehearing should be granted and the judgment be reversed and the cause remanded."

IRON SILVER MINING COMPANY *v.* MIKE AND STARR GOLD AND SILVER MINING COMPANY. (No. 2.)

BREWER, J. Case No. 3, between the same parties, presents the same questions, and the same judgment of affirmance will be entered therein.

FIELD, J., dissenting. This case presents the same questions which are considered in the case of a similar title, No. 2, just decided, only that the former relates to the Goodell lode claim and the latter to the Gardener lode claim.

The two cases were tried together upon the same testimony, subject to the same objections and exceptions, and the instructions given by the court were so worded as to apply to both. I dissent from the judgment in this case for the reasons expressed in my dissent from the judgment in the former case.

Statement of the Case.

MR. JUSTICE HARLAN and MR. JUSTICE BROWN concur in this dissent.

Mr. L. S. Dixon and *Mr. Ashley Pond* for plaintiff in error. *Mr. James McKeen* and *Mr. Frank W. Owers* were on their brief.

Mr. T. M. Patterson for defendant in error.

SULLIVAN v. IRON SILVER MINING COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

No. 7. Argued November 20, 23, 1891.— Decided February 29, 1892.

A placer patent conveys to the patentee full title to all lodes or veins within the territorial limits, not then known to exist; and mere speculation and belief, based, not on any discoveries in the placer tract, or any tracings of a vein or lode adjacent thereto, but on the fact that quite a number of shafts, sunk elsewhere in the district, had disclosed horizontal deposits of a particular kind of ore, which, it was argued, might be merely parts of a single vein of continuous extension through all that territory, is not the knowledge required by the law.

As the judgment in this case rests upon a sound principle of law, this court affirms it, although it was put, by the court below, upon an unsound principle.

THIS was an action of ejectment, commenced in the Circuit Court of the United States for the District of Colorado on the 5th day of March, 1883, by the defendant in error. The complaint alleged that on the first day of January, 1883, plaintiff was the owner and in possession of a tract of land in Lake County, Colorado, known as the Wells and Moyer placer claim, consisting of 193 $\frac{43}{100}$ acres, the description of which was given in full; that while so in possession, and on the 2d day of January, 1883, the defendants entered upon a certain portion, which was fully described, being about ten acres, and wrongfully seized and detained the same. In their answer the defendants set forth that the plaintiff held title to the placer claim by a patent

from the United States, of date March 11, 1879, which contained these restrictions and exceptions:

"First. That the grant hereby made is restricted in its exterior limits to the boundaries of the said lot No. 281, as hereinbefore described, and to any veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits which may hereafter be discovered within said limits, and which are not claimed or known to exist at the date hereof.

"Second. That should any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits be claimed or known to exist within the above-described premises at the date hereof, the same is expressly excepted and excluded from these presents."

They also averred that at the time of the location of the placer claim and the issue of the patent a vein or deposit of mineral ore in rock in place, of great value, was known and claimed to exist within the boundaries and underneath the surface of said placer claim, and that the patentee knew that said vein was claimed to exist, and did exist, within said premises; that the application for the patent did not contain any application for said vein or lode; and that on the 1st day of January, 1883, the defendants, citizens of the United States, went upon the premises and sunk a shaft thereon, and at the depth of more than ten feet from the surface cut and exposed said vein or deposit, and proceeded afterwards to file a location certificate. A demurrer to this answer was sustained, and judgment entered for the plaintiff. The defendants took the case on error to this court, and here the judgment of the Circuit Court was reversed. *Sullivan* v. *Mining Company*, 109 U. S. 550. The case turned on the construction of the pleadings, and it was held that the "allegation in the answer, that the vein was known by the patentees to exist at the times mentioned, is an allegation, in the very words of the statute itself, of the fact which the statute declares shall be conclusive against any right of possession of the vein or lode claim in a claimant of the placer claim only." No opinion was expressed on the question discussed by counsel, as to whether any other

than a located vein or lode could be deemed to be a known vein or lode within the meaning of the statute and the exception in the patent. On the return of the case to the Circuit Court, a replication was filed, denying that there was at the time of the location of the placer claim or the issue of the placer patent any known vein, lode or mineral deposit within the premises, and also denying that the defendants discovered or exposed any vein, lode or mineral deposit of any kind whatever. On November 17, 1885, the case was tried before a jury, the verdict and judgment were for the plaintiff, and the defendants again bring the case here on error.

Mr. T. M. Patterson for plaintiffs[1] in error.

Mr. L. S. Dixon and *Mr. Ashley Pond* for defendant in error.

Mr. Justice Brewer delivered the opinion of the court.

On the trial, the court took the case away from the jury, the only instruction it gave being as follows:

"Under the opinion rendered by Judge McCrary in this case, it appears that the plaintiff is entitled to recover, the defendants' location not having been made until after the patent was issued, and we will enter your verdict for the plaintiff in such form as counsel may present."

In this the District Judge trying the case simply followed the opinion theretofore expressed by the Circuit Judge, to the effect that location was necessary before a vein or lode could be adjudged a known vein or lode within the exception in the patent, and the provision of section 2333, Revised Statutes. (5 McCrary, 274.) In this ruling was error, as has since been repeatedly determined by this court. *Reynolds* v. *Iron Silver Mining Co.*, 116 U. S. 687; *Iron Silver Mining Co.* v. *Reynolds*, 124 U. S. 374; *Noyes* v. *Mantle*, 127 U. S. 348, 353; *Iron Silver Mining Co.* v. *Mike & Starr Mining Co.*, *ante*, 394. In *Noyes* v. *Mantle*, this court, speaking of sec. 2333,

[1] Argued with No. 2, *ante*, 394, and No. 3, *ante*, 430.

used this language: "The section can have no application to lodes or veins within the boundaries of a placer claim which have been previously located under the laws of the United States, and are in possession of the locators or their assigns; for, as already said, such locations, when perfected under the law, are the property of the locators, or parties to whom the locators have conveyed their interest. As said in *Belk* v. *Meagher*, 104 U. S. 279, 283: 'A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold, and conveyed, and will pass by descent.' It is not, therefore, subject to the disposal of the government. The section can apply only to lodes or veins not taken up and located so as to become the property of others. If any are not thus owned, and are known to exist, the applicant for the patent must include them in his application, or he will be deemed to have declared that he had no right to them. *Sullivan* v. *Iron Silver Mining Co.*, 109 U. S. 550, 554."

But, notwithstanding the technical error in this ruling, we cannot see that it wrought any prejudice to the substantial rights of the plaintiff in error, for, upon all the facts in the case, the judgment was one which must necessarily have been rendered. It appears beyond dispute, in fact it is alleged in the answer, that defendants entered upon the premises in January, 1883, and not earlier, and thereafter sank a shaft and did whatever work was done, and this, as appears by the pleadings and the testimony, was nearly four years after the issue of the patent. But a placer patent conveys to the patentee full title to all lodes or veins within the territorial limits, not then known to exist. So it matters not what developments or discoveries were made by these defendants after the issue of the patent. Nothing then disclosed could limit the effect of the patent, or except from its scope any vein or lode within its territorial limits. And, therefore, the testimony as to what took place after the issue of the patent, or as to the discoveries made thereafter, might properly have been excluded, and may now be wholly rejected in considering what judgment ought to have been rendered.

The only other question requiring notice is this: After the

plaintiff had finished its testimony, and the defendants had commenced offering theirs, the court intimated that it intended to direct a verdict for the plaintiff on the conceded fact that no location was made by the defendants until after the issue of plaintiff's patent, but at the same time notified the defendants that they could put in all the evidence they wished as to the existence of a lode, and the patentee's knowledge of it, and, replying to counsel for plaintiff, who was objecting to any further testimony, said: "Well, Mr. Owers, the theory upon which they proceed is that you never got this lode, [it] being known to you. Whether they made a valid location of it or not is another question; but if it was known to the patentee at the time of the entry, whether located or not, their position is, and they are going to maintain it in the Supreme Court if they can, that you never got title to it by means of your placer patent."

And after that, defendants offered a mass of testimony, the scope of which was similar to that condemned as insufficient in the case of *Iron Silver Mining Co.* v. *Reynolds*, *supra*. Its purport was that it was commonly believed that underlying all the country in that vicinity was a nearly horizontal vein or deposit, frequently called a blanket vein; and that the parties who were instrumental in securing this placer patent shared in that belief, and obtained the patent with a view to thereafter developing such underlying vein. But whatever beliefs may have been entertained generally, or by the placer patentees alone, there was up to the time the patent was obtained no knowledge in respect thereto. It was, so far as disclosed by this testimony, on the part of everybody, patentees included, merely a matter of speculation and belief, based not on any discoveries in the placer tract, or any tracings of a vein or lode adjacent thereto, but on the fact that quite a number of shafts sunk elsewhere in the district had disclosed horizontal deposits of a particular kind of ore, which it was argued might be merely parts of a single vein of continuous extension through all that territory. Such a belief is not the knowledge required by the section. In the case referred to this court said: "There may be difficulty in deter-

mining whether such knowledge in a given case was had, but between mere belief and knowledge there is a wide difference. The court could not make them synonymous by its charge, and thus in effect incorporate new terms into the statute." So, giving full weight to all the testimony offered by the defendants, both as to the workings and discoveries after the patent, and the speculations and beliefs existing prior to its issue, the court should have directed a verdict, as it did, for the plaintiff, and the only error was in giving a wrong reason for a correct instruction.

No substantial and prejudicial error appearing in the record, the judgment will be

Affirmed.

MR. JUSTICE FIELD concurring.

I concur in the judgment of affirmance in this case, but as I do not agree with all the views expressed in the opinion of the court I have concluded to state my own separately.

The action is for the possession of certain mining ground known as the Kit Carson lode, situated in Colorado, and within the boundaries drawn down vertically from the surface of what is known there as the Wells and Moyer placer claim. This placer claim was patented to Wells and Moyer March 11, 1879, upon an application made May 16, 1878, and an entry made July 22, following. It is designated in the public surveys as mineral lot No. 281. It embraces 193 acres and a fraction of an acre, which are fully described by metes and bounds both in the patent and the complaint in the action. The patent, among other conditions, contains the following:

First. That the grant is restricted within the boundaries of said lot 281, and to any veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits thereafter discovered within those limits, and which were not claimed or known to exist at the date of the patent.

Second. That should any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or

other valuable deposits be claimed or known to exist within the above-described premises at the date of the patent, the same are expressly excepted and excluded from it.

The defendants in answer to the action recited these exceptions to the patent and set up "that at the time of the location of said placer claim, and the survey thereof, and at the time of the application for said patent, and at the time of the entry of said land thereunder, and at the time and date of the issuing and granting of said patent, a lode, vein or deposit of mineral ore in rock in place, carrying carbonates of lead and silver, and of great value, was known to exist, and was claimed to exist, within the boundaries and underneath the surface of said Wells and Moyer placer claim, No. 281; and that the fact that said vein was claimed to exist, and did exist as aforesaid, within said premises, was known to the patentees of said claim at all the times hereinbefore mentioned;" and "that the said application for said patent by said patentees and grantors of said plaintiff did not include any application whatever for a patent of or to said lode or vein within its boundaries aforesaid." The defendant, therefore, averred "that the said failure to include said vein or lode in said application amounted to a conclusive declaration by said patentees that they made no claim whatever to said lode or vein, or any part thereof, and that the same was expressly excepted and excluded from, and did not pass with, the grant of the premises by the patent."

The defendants further alleged that on the 1st of January, 1883, they, being then and now citizens of the United States, went upon the premises described in the complaint and sunk a shaft thereon, which uncovered and exposed said lode, vein or deposit, and that thereupon they proceeded to locate the same as a lode claim by erecting at the point where they cut the said vein a notice, containing the name of said lode, to wit, the Kit Carson lode, the date of the location, and their names as locators, and caused the surface boundaries of the claim to be marked by posts, and afterwards filed a location certificate containing the name of the lode, the names of the locators, the date of the location, the number of feet in length claimed

on each side of the centre of the discovery shaft, and the general course and direction of the claim as near as might be. The defendants therefore claimed the right to occupy and possess the premises in full accordance with and by virtue of a full compliance with the requirements of the laws of the United States and of the State of Colorado, the said vein, lode or deposit being a part and parcel of the unappropriated public mineral domain of the United States.

A demurrer to this answer was sustained by the Circuit Court, and judgment being entered thereon, the case was brought here for review at October term, 1883. The demurrer was on the ground that the answer did not disclose any defence, because it showed that neither the defendants nor their grantors had discovered, located or recorded a lode or vein such as is described in section 2320 of the Revised Statutes, at or before the application for the placer patent, but that the defendants located their lode claim within the boundaries of the patented ground after the issue of the patent; and because the applicants for the placer claim were not required to apply for the vein or lode claim unless it had been duly discovered, located and recorded, and was owned by the applicants for the placer patent at the time of their application. This court reversed the judgment of the Circuit Court for the plaintiff on the demurrer, holding that it was sufficient as a matter of pleading, to bring an alleged lode or vein within the exception of the patent, to aver that it was known to the patentee to exist at the time of his applying for a patent, and was not included in his application. 109 U. S. 550.

On the trial in the Circuit Court the plaintiff gave in evidence its patent, and to show the date of the location of the lode claim by the defendants produced the certificate of their location. This certificate is dated January 2, 1883, and alleges a location made on that day upon a discovery of the same date.

To establish the existence of the lode claimed by the defendants, the testimony of four witnesses was introduced. One of them, Leonhardy, was allowed to testify, against the objection of the plaintiff, as to the existence of various lodes in the

vicinity of the placer claim of William Moyer and the placer claim of Wells and Moyer, and of the character of their underground workings. He was also permitted, under like objection, to give the statements of one Stevens, made to him years before, as to the latter's opinion then of the existence of a large body of mineral wealth under the surface of the country "round about there," although his interest in the premises in controversy was only acquired by purchase with Leiter from the owners of the placer claim after they had applied for a patent, and the statements were not made in the hearing of such owners. Testimony of this character was, in my judgment, clearly inadmissible. The testimony of Sullivan, one of the locators of the lode in suit, only went to the character of that lode, the extent to which a shaft had been sunk, its developments, and also as to the existence of other lodes in the vicinity of the placer claim. There was not a particle of evidence from any source showing that the vein or lode located by the defendants was known to exist at the date of the application for the placer patent, much less that its existence was brought to the knowledge of the patentee. Its location was nearly five years after the application for the placer patent, and nearly four years after the patent was issued. The existence of the Mike tunnel and its extension within the boundaries of the Moyer placer claim (not the placer claim involved in this case) can have no bearing upon the questions presented, even if there had been at any time discovered within that tunnel valuable mineral of sufficient extent to justify the expenditure of time and money for its development.

Upon the close of the testimony the court instructed the jury that the plaintiff was entitled to recover, the defendants' location not having been made until after the patent was issued, and directed them to find a verdict in its favor. They accordingly found such verdict, and the question before this court is as to the correctness of this instruction.

Exceptions to the operation of the patent are founded upon section 2333 of the Revised Statutes, which is as follows:

"Where the same person, association or corporation is in possession of a placer claim, and also a vein or lode included

within the boundaries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer claim, or any placer claim not embracing any vein or lode claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section twenty-three hundred and twenty, is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim which does not include an application for the vein or lode claim, shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof."

This section, as this court has said on more than one occasion, makes provision for three distinct classes of cases:

1. Where one applies for a placer patent, who is at the time in the possession of a vein or lode included within its boundaries, he must state the fact, and then, on payment of the sum required for a vein or lode claim and twenty-five feet on each side of it at $5.00 an acre, and $2.50 an acre for the placer claim, a patent will issue to him covering both claim and lode.

2. Where a vein or lode, such as is described in a previous section of the Revised Statutes — that is, of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits — is known to exist at the time within the boundaries of the placer claim, the application for a patent therefor, which does not also include an application for the vein or lode, will be construed as a conclusive declaration that the claimant of the placer claim has no right of possession to the vein or lode.

3. Where the existence of a vein or lode in a placer claim is not known at the time of the application for a patent, that instrument will convey all valuable mineral and other deposits within its boundaries. *Iron Silver Mining Co.* v. *Reynolds*, 124 U. S. 374, 382; also *Reynolds* v. *Iron Silver Mining Co.*, 116 U. S. 687, 696.

The exception made in the patent of the placer claim, of any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits, "*claimed* or known to exist," at *the date of the patent*, within the described premises, is in two particulars broader than the language of the statute, and to that extent is inoperative. It was so held in *Iron Silver Mining Company* v. *Reynolds*, 124 U. S. 374, 382, and in *United States* v. *Iron Silver Mining Company*, 128 U. S. 673, 680. The exception of the statute cannot be extended by those whose duty it is to supervise the issuing of the patent. It was so held in *Deffeback* v. *Hawke*, 115 U. S. 392, 406, where a mining patent for a placer claim was alleged to cover certain buildings and improvements of the defendant, and it was contended in an action to recover the premises, that the patent should have contained a reservation excluding from its operation the buildings and improvements not belonging to the patentee, and all rights necessary or proper to their possession and enjoyment. But the court held that this position had no support in any legislation of Congress, adding: "The land officers, who are merely agents of the law, had no authority to insert in the patent any other terms than those of conveyance, with recitals showing a compliance with the law and the conditions which it prescribed. The patent of a placer mining claim carries with it the title to the surface included within the lines of the mining location, as well as to the land beneath the surface." A similar ruling was made in *United States* v. *Iron Silver Mining Co.*, 128 U. S. 673, 680.

It thus appears that, according to the repeated decisions of this court, to bring a vein or lode of quartz or other rock in place bearing precious metals within the exceptions of the statute, and of course within those of the patent to the extent

to which they are operative, the vein or lode must have been known to exist at the time application for the patent was made. The knowledge of the applicant is necessarily limited to what has then been discovered; he cannot, of course, speak of possible future discoveries.

Before a vein or lode can be deemed to fall within those excepted from the placer patent, as a *known* lode existing at the time of the application of the patentee, the lode must be discovered and located, so far as to be capable of measurement.

The instruction of the court below directing a verdict for the plaintiff being in harmony with the decisions of this court as to the necessity of showing the existence of a lode known to the patentee at the time of his application for a patent, to except the lode from conveyance to the patentee, I agree that the judgment is rightly affirmed.

SCHWAB *v.* BERGGREN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 977. Argued January 21, 26, 1892. — Decided February 29, 1892.

At common law it was deemed essential in capital cases that inquiry be made of the defendant before judgment was passed whether he had anything to say why sentence of death should not be pronounced upon him; thus giving him an opportunity to allege any ground of arrest, or to plead a pardon if he had obtained one, or to urge any legal objection to further proceedings against him. And if the record did not show that such privilege was accorded to him the judgment would be reversed.

This rule, however, does not apply to an appellate court, which, upon review of the proceedings in the trial court, merely affirms a final judgment, without rendering a new one. Due process of law does not require his presence in the latter court at the time the judgment sentencing him to death is affirmed.

Neither the statutes of Illinois nor due process of law, require that the accused, upon the affirmance of the judgment sentencing him to death, shall be sentenced anew by the trial court. The judgment is not vacated by the writ of error; only its execution is stayed pending proceedings in the appellate court.

Opinion of the Court.

The time and place of executing the sentence of death is not strictly part of the judgment unless made so by statute.

The governor of Illinois has power under the constitution of that State, to commute the punishment of death to imprisonment for life in the penitentiary.

THE case is stated in the opinion.

Mr. Benjamin F. Butler and *Mr. M. Salomon* for appellant.

Mr. George Hunt, Attorney General of the State of Illinois, (with whom was *Mr. E. S. Smith* on the brief,) for appellee.

MR. JUSTICE HARLAN delivered the opinion of the court.

This is an appeal from an order sustaining a demurrer to a petition by the appellant for a writ of *habeas corpus*, and dismissing that petition.

In the case of *People of Illinois* v. *August Spies, Michael Schwab, Samuel Fielden et al.* — which was an indictment for murder in the Criminal Court of Cook County, in the State of Illinois — an order was entered, October 9, 1886, as follows:

"The People of the State of Illinois
v.
"Michael Schwab, Impl'd, etc. } 18803. Indictment for murder.

"This day again come the said people, by Julius S. Grinnell, State's attorney, and the said defendant, as well in his own proper person as by his aforesaid counsel, also comes; and now, neither the said defendant nor his counsel for him saying anything further why the judgment of the court should not now be pronounced against him on the verdict of guilty heretofore rendered to the indictment in this cause —

"Therefore it is ordered and adjudged by the court that the said defendant, Michael Schwab, be taken from the bar of the court to the common jail of Cook County, from whence he came, and be confined in said jail in safe and secure custody until the third day of December, A.D. 1886, and that on said third day of December, between the hours of ten

o'clock in the forenoon and two o'clock in the afternoon, the said defendant, Michael Schwab, be by the sheriff of Cook County, according to law, within the walls of said jail or in a yard or enclosure adjoining the same, hanged by the neck until he is dead, and the said sheriff is hereby required and commanded to take the body of the said defendant, Michael Schwab, and confine him in the said common jail of Cook County in such safe and secure custody, and upon the said third day of December, A.D. 1886, between the hours of ten o'clock in the forenoon and two o'clock in the afternoon, to hang the said defendant. Michael Schwab, by the neck until he be dead."

The case was carried, by writ of error, to the Supreme Court of Illinois, where the following order was made September 14, 1887, one of the regular days of that court:

"August Spies, Michael Schwab, Samuel Fielden, Albert R. Parsons, Adolph Fischer, George Engel, Louis Lingg, and Oscar W. Neebe *v.* "The People of the State of Illinois.	59 A. D. Error to the Criminal Court of Cook County

"On this day came again the said parties, and the court having diligently examined and inspected, as well the record and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the court now here that neither in the record nor proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious, or defective, and that that record is no error:

"Therefore it is considered by the court that the judgment aforesaid be affirmed in all things as to each and every of said plaintiffs in error and stand in full force and effect, notwithstanding the said matters and things therein assigned for error.

"And it is further ordered by the court that the eleventh day of November, A.D. 1887, be, and the same is hereby, fixed

as the time when the sentence of death, pronounced upon said plaintiffs in error, August Spies, Michael Schwab, Samuel Fielden, Albert R. Parsons, Adolph Fischer, George Engel, and Louis Lingg, by the criminal court of Cook County, Illinois, shall be executed.

"And it is further ordered by the court that the sheriff of Cook County, Illinois, be, and he is hereby, ordered and directed to carry into execution the sentence by the Criminal Court of Cook County, Illinois, of the defendants in the indictment, August Spies, Michael Schwab, Samuel Fielden, Albert R. Parsons, Adolph Fischer, George Engel, and Louis Lingg, on Friday, the eleventh day of November next (November 11, A.D. 1887,) between the hours of ten o'clock in the forenoon and four o'clock in the afternoon of that day.

"And it is further considered by the court that the said defendants in error recover of and from the said plaintiffs in error their costs by them in this behalf expended, and that they have execution therefor."

On the day preceding that fixed for the execution the governor of Illinois commuted the sentence of death imposed upon Schwab, to imprisonment in the penitentiary for life, in consequence of which the sheriff of Cook County delivered him on the 12th of November, 1887, to the warden of the penitentiary at Joliet, Illinois, in which institution he has ever since been confined at hard labor. On the same day of the commutation of the sentence the governor addressed to the warden a communication, in which it was said: "The commutation papers will this day be forwarded by me to the sheriff of Cook County, Illinois, directed to Canute R. Matson, sheriff of said county, with instructions to him to deliver said Fielden and Schwab into your custody as warden of the Illinois penitentiary, at Joliet, together with the commutation papers in each case. You will receive the said Samuel Fielden and Michael Schwab, as warden of said penitentiary, into your custody, whereby under said commutation you are hereby directed to receive said Samuel Fielden and Michael Schwab into your custody as warden of said penitentiary, and to confine the said Fielden and Schwab in said penitentiary, in safe and secure custody

and keeping, at hard labor during the term of their natural lives. The said commutation papers would have been sent, as is usual, directly to you. I desired, however, that the sheriff might temporarily have said papers in his possession on the day when said Fielden and Schwab, with several other persons named in said sentence which was pronounced against them, were to be executed on the 11th day of November, 1887, that he might be able by said papers to show why the sentence of said Samuel Fielden and Michael Schwab was not carried into execution, as pronounced by said court against them."

It is averred in the petition for the writ of *habeas corpus* that the recital in the judgment of the Supreme Court of Illinois, that "on this day came again the said parties," was and is false and untrue, in that the petitioner was, before and at the date of said order, and up to and including November 12th, 1887, imprisoned, continuously, in the county jail of Cook County, and was not, when the order of September 14th, 1887, was made, present personally or by counsel in that court, nor had he notice, personally or by counsel, to be present there on that day.

The petitioner claimed that his detention in the penitentiary, and his confinement there at hard labor, were in violation of the Constitution and laws both of Illinois and the United States.

The demurrer to the petition for the writ admits that the judgment of the Supreme Court of Illinois of September 14th, 1887, was rendered in the absence of both the appellant and his counsel, and without notice to either that the case would be disposed of at that time. It is, therefore, contended by the appellant that the judgment was void, as not being that due process of law required by the Constitution of the United States, where life or liberty is involved.

At common law, it was deemed essential in capital cases, that inquiry be made of the defendant, before judgment was passed, whether he had anything to say why the sentence of death should not be pronounced upon him; thus giving him an opportunity to allege any ground of arrest, or to plead a pardon, if he had obtained one, or to urge any other legal ob-

jection to further proceedings against him. This privilege was deemed of such substantial value to the accused, that the judgment would be reversed if the record did not show that it was accorded to him. *Ball* v. *United States*, 140 U. S. 118, 129; 1 Chitty's Crim. Law, 699, 700; *Rex* v. *Geary*, 2 Salk. 630; *King* v. *Speke*, 3 Salk. 358; *Anonymous*, 3 Mod. 266; 1 Archbold's Crim. Prac. & Plead. (Pomeroy's edition) 577, 578. And it has been so ruled in the courts of some of the States. *Hamilton* v. *Commonwealth*, 16 Penn. St. 129, 133; *Messner* v. *People*, 45 N. Y. 1, 5; *James* v. *State*, 45 Mississippi, 572, 579; *Crim* v. *State*, 43 Alabama, 53, 56; *Perry* v. *State*, 43 Alabama, 53; *State* v. *Jennings*, 24 Kansas, 642, 659; *Keech* v. *State*, 15 Florida, 591, 609; *Grady* v. *State*, 11 Georgia, 253, 257; *Safford* v. *The People*, 1 Parker's Crim. Rep. 474, 476.

But this rule of the common law, as the authorities clearly show, applied to the court of original jurisdiction which pronounced the sentence, and not to an appellate court, which, upon review of the proceedings in the trial court, merely affirms the final judgment — no error having been committed to the prejudice of the accused — without rendering a new judgment. The entire argument, on behalf of the appellant, assumes that the Supreme Court of Illinois pronounced a sentence of death upon him. But such is not the fact. The sentence of death, by hanging, was pronounced by the Criminal Court of Cook County, October 9th, 1886, "neither the said defendant nor his counsel for him saying anything further why the judgment of the court should not now be pronounced against him on the verdict of guilty heretofore rendered to the indictment in this cause." The execution of that sentence having been stayed by the prosecution of a writ of error, with supersedeas, the Supreme Court of the State, upon examination of the matters assigned for error, affirmed the judgment in all things, and (the day originally fixed for the execution having passed) fixed November 11th, 1887, as the day for carrying into execution "the sentence by the criminal court of Cook County." What that court did was in strict conformity with the Criminal Code of Illinois relating to prosecutions by

indictment for capital offences, which provides that "if the judgment is affirmed, the Supreme Court shall, by order, fix the time when the original sentence of death shall be executed, a copy of which order shall be sufficient authority to the sheriff for the execution of the prisoner at the time therein specified;" and that "if the judgment is affirmed, the Supreme Court shall direct the court in which the original sentence was rendered to carry the same into effect, and shall give judgment against the plaintiff in error for costs, and execution may issue therefor from the Supreme Court." Rev. Stats. Illinois, c. 38, Crim. Code, §§ 459, 465, Div. XV.

Numerous authorities have been cited for the appellant in support of the general common law rule that the accused must be present when the judgment against him is pronounced; but they fall far short of establishing the contention that due process of law required his personal presence in the Supreme Court of Illinois at the time the order was entered affirming the judgment by which he was sentenced to death. No case is cited, and we are aware of no well-considered case, which supports that contention. The personal presence of the accused, from the beginning to the end of a trial for felony, involving life or liberty, as well as at the time final judgment is rendered against him, may be, and must be assumed to be, vital to the proper conduct of his defence, and cannot be dispensed with. This court in *Hopt* v. *Utah*, 110 U. S. 574, 579, after observing that the public has an interest in the life and liberty of the accused, and that neither can be lawfully taken except in the mode prescribed by law, said: "That which the law makes essential in proceedings involving deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods. The great end of punishment is not the expiation or atonement of the offence committed, but the prevention of future offences of the same kind. 4 Bl. Com. 11. Such being the relation which the citizen holds to the public, and the object of punishment for public wrongs, the legislature has deemed it essential to the protection of one whose life or liberty is involved in a

prosecution for felony, that he shall be personally present at the trial, that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution." See *Harris* v. *People*, 130 Illinois, 457, 459. But neither reason nor public policy require that he shall be personally present pending proceedings in an appellate court whose only function is to determine whether, in the transcript submitted to them, there appears any error of law to the prejudice of the accused; especially, where, as in this case, he had counsel to represent him in the court of review. We do not mean to say that the appellate court may not, under some circumstances, require his personal presence; but only that his presence is not essential to its jurisdiction to proceed with the case.

In *Fielden* v. *People*, 128 Illinois, 595, 601, the Supreme Court of Illinois, speaking by Mr. Justice Schofield, after showing that the rule at common law, to which we have adverted, could have no application to that court, which acts and decides only upon the record made in the trial court, said: "We may add, moreover, it has not been the practice of this court, from its organization to the present time, to have the plaintiff in error in a criminal case actually present in court at the hearing and when final judgment is given; and it is clear, from the different provisions of the statute, that it not only does not provide for their presence, but it contemplates that they will not be present."

In *Donnelly* v. *State*, 2 Dutcher (26 N. J. Law) 463, 471, — which was a case of conviction of murder, — it was said: "If the presence of the prisoner is necessary in cases of murder to conduct a writ of error, or to receive the judgment of the court, it is, upon the principles of the English law, equally so in all other cases of felony or crimes above misdemeanors. But upon examining the precedents, we do not find a single case, where, upon writ of error, the defendant was either brought into this court or prosecuted the writ in person." After referring to several previous cases, the court proceeded:

"We think it must be considered as settled by the practice in this State, that in proceedings upon writ of error the personal presence of the prisoner in court is not a technical necessity; that he appears by counsel, errors are assigned by counsel, and judgment may be pronounced in the defendant's absence."

In *State* v. *Overton*, 77 Nor. Carolina, 485, which was, also, a case of murder, a judgment of conviction was affirmed by the Supreme Court of North Carolina, and the decision was certified to the court of original jurisdiction that the latter might proceed to judgment and execution. The prisoner objected to any judgment being rendered against him, because he had been denied his constitutional right of being present in the Supreme Court of North Carolina when his case was there argued and determined. The court said: "This objection is founded upon an erroneous idea of a criminal trial, and of the power and duty of this court in such a case brought before it by appeal. The constitution provides that a defendant in a criminal action shall be informed of the accusation against him, and shall have the right to confront the accusers and witnesses with other testimony, and shall not be convicted except by the unanimous verdict of a jury of good and lawful men in open court as heretofore used. *That* is his *trial.* This of course implies that he shall have a right to be present. If he complains of any error in his trial, the record of the trial is transmitted to this court. *Here*, are no 'accusers,' no 'witnesses,' and no 'jury'; but upon inspection of the record this court decides whether there was error in the trial, and without rendering any judgment, orders its decision to be certified to the court below. It has never been understood, nor has it been the practice that the defendant shall be present in *this* court; nor is he ever 'convicted' here." To the same effect are *State* v. *Leah*, 90 Nor. Carolina, 655; *State* v. *Jacobs*, 107 Nor. Carolina, 772. See also *People* v. *Clark*, 1 Parker's Criminal Rep. 360, 367.

We are of opinion that the practice prevailing in Illinois, New Jersey and North Carolina, as shown in the above cases, is that which is pursued, and has always been pursued, in the

different States, as well as at common law. It is not only consistent with "due process of law" — giving these words the most liberal interpretation — but is founded on a wise public policy.

Nor is the question affected by the fact that the Supreme Court of Illinois, under express authority conferred by statute, fixed the time when the punishment prescribed by the judgment which it affirmed should be inflicted. Neither the statute nor due process of law required that the accused should, upon the affirmance of the judgment, be sentenced anew by the trial court to suffer the punishment of death, or that he should be present when the day was fixed by the appellate court for carrying the original sentence into execution. The judgment prescribing that punishment was not vacated by the writ of error; only its execution was stayed pending proceedings in the appellate court. Besides, it is well settled that the time and place of execution are not, strictly, part of the judgment or sentence, unless made so by statute. *Holden* v. *Minnesota*, 137 U. S. 483, and authorities there cited; 1 Chitty's Crim. Law, 780, 787; *Costley* v. *Commonwealth*, 118 Mass. 32.

It is said in respect to the commutation by the governor of his sentence to imprisonment in the penitentiary for life that it was of no effect if the judgments were void. But the judgments are held not to be void. It is proper, however, to say that the constitution of Illinois expressly confers upon that officer the power "to grant reprieves, commutations and pardons, after conviction, for all offences." Art. 5, sec. 13. Of course, therefore, the governor had authority to commute the punishment of death to imprisonment for life in the penitentiary. And by the statutes of Illinois, the penitentiary at Joliet is made the general penitentiary and prison of that State for the confinement and reformation, as well as for the punishment of all persons sentenced by any court of competent jurisdiction in that State for the commission of crime the punishment of which is confinement in the penitentiary, "in which the person so sentenced shall be securely confined, employed at hard labor." Rev. Stats. Illinois, c. 108, sec. 1. So that the detention of the appellant by the warden of the penitentiary is

not in violation of any rights secured to him by the Constitution of the United States.

There are no other questions in the case which require to be noticed, and the judgment must be

Affirmed.

FIELDEN *v.* ILLINOIS.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 909. Argued January 21, 26, 1892. — Decided February 29, 1892.

F. was convicted of murder, in the Criminal Court of Cook County, Illinois, and sentenced by that court to suffer the penalty of death. Upon writ of error to the Supreme Court of Illinois, that judgment was affirmed and the day fixed in the original judgment for carrying the sentence into execution having passed, that court fixed another day. After the expiration of the term the accused applied for a correction of the record of the Supreme Court, so as to show that he was not present in that court when the original judgment was affirmed, and another day fixed for the execution. The application was denied upon the ground, in part, that amendments of the record of the court in derogation of the final judgment could not be allowed at a subsequent term. *Held*,

(1) That the law of Illinois, as declared by its highest court, in respect to amendments of the record, was applicable to all persons within the jurisdiction of that State, and its enforcement against the plaintiff in error was not a denial to him by the State of the equal protection of the laws;

(2) That due process of law did not require the presence of the accused in the appellate court when the original judgment of the trial court was affirmed, and a new day fixed for his execution.

THE case is stated in the opinion.

Mr. Benjamin F. Butler and *Mr. M. Salomon* for plaintiff in error.

Mr. George Hunt, Attorney General of the State of Illinois, (with whom was *Mr. E. S. Smith* on the brief,) for defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

Opinion of the Court.

The judgment of the Supreme Court of Illinois, rendered September 14th, 1887, in the case of *Spies et al.* v. *Illinois*, and which is set out in the opinion in *Schwab* v. *Berggren*, *ante*, 442, was before this court on application for a writ of error which was dismissed November 2d, 1887. 123 U. S. 131.

As stated in the opinion in *Schwab* v. *Berggren*, *ante*, 442, it was represented to the court below, by a petition filed March 5th, 1888, by Fielden, Neebe and Schwab, three of the defendants convicted in the Criminal Court of Cook County of the crime of murder, that the order of September 14th, 1887, was false and untrue in its recital that they were in court when it was entered; whereas, in fact, neither of them was so present, in person or by counsel, nor were they or either of them, or the counsel of either, notified to be present on that day in court. They asked an amendment of the record that would make it conform to the truth, and show upon its face the above facts. The application was supported by the affidavits of counsel. This motion was stricken from the docket by order of court entered March 16, 1888. Subsequently, March 22d, 1888, a motion was made to set aside that order, and the application to amend the record, in the manner above indicated, was renewed. This motion was taken under advisement, and its consideration deferred until the succeeding term; and, on the 15th of March, 1889, was denied.

Subsequently, March 26th, 1889, Fielden, Schwab and Neebe asked leave to amend the original motion, so as to add thereto the following: "And in support of said motion to amend said record your petitioners file herewith, and refer to the same in support of amendment of said record, the affidavits of Samuel Fielden, Michael Schwab, Oscar W. Neebe, petitioners, and W. P. Black and M. Salomon, petitioners' attorneys, wherein it is set forth that none of the plaintiffs in error appeared or could appear in this honorable court, where the said judgment was given, nor were they or any of them present by counsel on said occasion, nor were their counsel notified or furnished opportunity to be present on said occasion; and petitioners further say and allege and claim that the said recital in said record deprives petitioners and said plaintiffs in

error of substantial rights guaranteed the said plaintiffs in error by the Constitution of the United States and by the constitution of the State of Illinois, and particularly in said recital on said record and the judgment of this court, in violation of the 14th Amendment to the Constitution of the United States, and in violation of section two of article two of the constitution of the State of Illinois; and plaintiffs in error claim the benefit, right, privileges and immunities guaranteed by the constitutional provisions referred to." At the same time, they applied for a rehearing of the motion previously made, claiming that the decision of the court below in overruling it and in refusing to amend the record as requested by them was in violation of the rights secured to them by the 14th Amendment of the Constitution of the United States and by other provisions of that instrument and also in violation of section two of article two and other provisions of the constitution of the State of Illinois. They insisted, in the application for a rehearing, that a legal judgment could not have been rendered against them unless they were brought before the court and were personally present when the judgment against them was pronounced; that the refusal to amend the record and permitting it to stand as it was, deprived them of their right and privilege of questioning the judgment so pronounced, "if petitioners shall see fit to do so, in the United States Supreme Court, to which petitioners claim they have a right of appeal from the judgment of this court condemning petitioners." They also applied for leave to present a bill of exceptions, embodying the above motions, amendment to motion, petition for rehearing, and affidavits filed in support of the application to amend the record. The Supreme Court of Illinois overruled each motion and the petition for rehearing, and from its order to that effect Fielden prosecuted this writ of error.

The Supreme Court of Illinois held that under the practice in that State, "amendments of the record in affirmance of the judgment, when there is anything to amend by, may, upon notice, be made at a term subsequent to that at which final judgment is rendered; but amendments not in affirmance but in derogation of the judgment are not allowed at a term sub-

sequent to that at which final judgment is rendered. . . . This motion, not having been made at the same term at which final judgment was rendered, nor until the case had passed beyond the power of this court to stay, by its order, the execution of the judgment, clearly comes too late." In order that it might not be understood as conceding that the amendment, if made, would affect the validity of the judgment, the court proceeded to show that, according to the principles of the common law, as well as under the laws of Illinois, it had jurisdiction to hear and finally determine, in the absence of the defendants, the writ of error sued out for the review of the judgment of the Criminal Court of Cook County. It said: "If the present plaintiffs in error and their counsel had been actually present in court when the judgment of affirmance here was entered, the law allowed them to then say or do nothing which by any possibility could have benefited plaintiffs in error. They were, after judgment was entered, entitled only to move for a rehearing, and this could only be done on printed petition; but thirty days were allowed in which to prepare it. 93 Illinois, 11, rule 41." "Undoubtedly," the court further said, "if plaintiffs in error or their counsel had been actually present in court when the decision was announced they would then have known what the decision was, but that fact was equally well made known to them by notice from the clerk, in ample time to avail of their right to file a petition for rehearing. And if, indeed, without any fault of theirs, more time would have been needed within which to prepare the petition for rehearing it was within the recognized practice of this court to have extended the time for that purpose beyond the thirty days. But no claim is here made that plaintiffs in error were not informed of the decision in the case in time to file a petition for rehearing. They did not seek to avail of that right, but voluntarily waived it, and prosecuted a writ of error upon the record from the Supreme Court of the United States, and it was not until after that was decided adversely to them that they discovered the claimed error in the record of which amendment is now sought." *Fielden* v. *The People*, 128 Illinois, 595.

The plaintiff in error contends that the refusal to amend the record, so as to show that he was not present in person or by counsel in the Supreme Court of Illinois, at the time it affirmed the judgment of the trial court, and fixed the day for carrying that judgment into execution, was a denial to him of that equal protection of the laws which is accorded by the Constitution of the United States to all persons within the jurisdiction of the respective States; also, that such action upon the part of the court below was inconsistent with "due process of law."

Assuming that these constitutional questions were so raised, in the court below, as to authorize them to be considered here, we are of opinion that no right, secured to the plaintiff in error by the Constitution of the United States, was violated by the refusal of the Supreme Court of Illinois to allow the proposed amendment of its record. We take, as is our duty, the law of Illinois to be as declared by its highest court, that amendments of the record of a court, in derogation of its final judgment, are not permitted in that State after the expiration of the term at which the judgment was rendered. That law is applicable to all persons within the jurisdiction of the State, and its enforcement against the plaintiff in error cannot, therefore, be said to be a denial to him by the State of the equal protection of the laws. Neither discussion nor citation of authorities is required to support a proposition so manifestly correct.

When the original case was before this court, Chief Justice Waite said: "The objection that the defendants were not actually present in the Supreme Court of the State at the time sentence was pronounced cannot be made on the record as it now stands, because on its face it shows that they were present. If this is not in accordance with the fact, the record must be corrected below, not here. It will be time enough to consider whether the objection presents a Federal question when the correction has been made." *Spies* v. *Illinois*, 123 U. S. 131, 182. These observations were adverted to in argument, but we do not perceive that they have any bearing on the questions now raised. The Chief Justice only meant to

say that this court could not amend the record, but if amended by the court below, the question would still remain whether the objection referred to could be considered by this court.

Equally without merit is the suggestion that the action of the court below in disposing of the writ of error to the Criminal Court of Cook County, in the absence of the accused, was not in conformity to "due process of law." This question was determined in *Schwab* v. *Berggren*, just decided, and we do not deem it necessary to add anything to what is there said.

Judgment affirmed.

CHURCH OF THE HOLY TRINITY *v.* UNITED STATES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 143. Argued and submitted January 7, 1892. — Decided February 29, 1892.

The act of February 26, 1885, "to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States, its Territories, and the District of Columbia," 23 Stat. 332, c. 164, does not apply to a contract between an alien, residing out of the United States, and a religious society incorporated under the laws of a State, whereby he engages to remove to the United States and to enter into the service of the society as its rector or minister.

THE case is stated in the opinion.

Mr. Seaman Miller for plaintiff in error.

Mr. Assistant Attorney General Maury for defendant in error submitted on his brief.

MR. JUSTICE BREWER delivered the opinion of the court.

Plaintiff in error is a corporation, duly organized and incorporated as a religious society under the laws of the State of New York. E. Walpole Warren was, prior to September,

1887, an alien residing in England. In that month the plaintiff in error made a contract with him, by which he was to remove to the city of New York and enter into its service as rector and pastor; and in pursuance of such contract, Warren did so remove and enter upon such service. It is claimed by the United States that this contract on the part of the plaintiff in error was forbidden by the act of February 26, 1885, 23 Stat. 332, c. 164, and an action was commenced to recover the penalty prescribed by that act. The Circuit Court held that the contract was within the prohibition of the statute, and rendered judgment accordingly, (36 Fed. Rep. 303;) and the single question presented for our determination is whether it erred in that conclusion.

The first section describes the act forbidden, and is in these words:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That from and after the passage of this act it shall be unlawful for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States, its Territories, or the District of Columbia, under contract or agreement, parol or special, express or implied, made previous to the importation or migration of such alien or aliens, foreigner or foreigners, to perform labor or service of any kind in the United States, its Territories, or the District of Columbia."

It must be conceded that the act of the corporation is within the letter of this section, for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other. Not only are the general words labor and service both used, but also, as it were to guard against any narrow interpretation and emphasize a breadth of meaning, to them is added "of any kind;" and, further, as noticed by the Circuit Judge in his opinion, the fifth section, which makes specific exceptions, among them professional actors, artists, lecturers, singers and domestic

servants, strengthens the idea that every other kind of labor and service was intended to be reached by the first section. While there is great force to this reasoning, we cannot think Congress intended to denounce with penalties a transaction like that in the present case. It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act. As said in Plowden, 205: "From which cases, it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter they have expounded to extend to but some things, and those which generally prohibit all people from doing such an act they have interpreted to permit some people to do it, and those which include every person in the letter, they have adjudged to reach to some persons only, which expositions have always been founded upon the intent of the legislature, which they have collected sometimes by considering the cause and necessity of making the act, sometimes by comparing one part of the act with another, and sometimes by foreign circumstances."

In *Margate Pier Co.* v. *Hannam*, 3 B. & Ald. 266, 270, Abbott, C. J. quotes from Lord Coke as follows: "Acts of Parliament are to be so construed as no man that is innocent or free from injury or wrong be, by a literal construction, punished or endamaged." In the case of the *State* v. *Clark*, 5 Dutcher, (29 N. J. Law) 96, 98, 99, it appeared that an act had been passed making it a misdemeanor to wilfully break down a fence in the possession of another person. Clark was indicted

under that statute. The defence was that the act of breaking down the fence, though wilful, was in the exercise of a legal right to go upon his own lands. The trial court rejected the testimony offered to sustain the defence, and the Supreme Court held that this ruling was error. In its opinion the court used this language: "The act of 1855, in terms, makes the wilful opening, breaking down or injuring of any fences belonging to or in the possession of any other person a misdemeanor. In what sense is the term wilful used? In common parlance, wilful is used in the sense of intentional, as distinguished from accidental or involuntary. Whatever one does intentionally he does wilfully. Is it used in that sense in this act? Did the legislature intend to make the intentional opening of a fence for the purpose of going upon the land of another indictable, if done by permission or for a lawful purpose? . . . We cannot suppose such to have been the actual intent. To adopt such a construction would put a stop to the ordinary business of life. The language of the act, if construed literally, evidently leads to an absurd result. If a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity. The court must restrain the words. The object designed to be reached by the act must limit and control the literal import of the terms and phrases employed." In *United States* v. *Kirby*, 7 Wall. 482, 486, the defendants were indicted for the violation of an act of Congress, providing "that if any person shall knowingly and wilfully obstruct or retard the passage of the mail, or of any driver or carrier, or of any horse or carriage carrying the same, he shall, upon conviction, for every such offence pay a fine not exceeding one hundred dollars." The specific charge was that the defendants knowingly and wilfully retarded the passage of one Farris, a carrier of the mail, while engaged in the performance of his duty, and also in like manner retarded the steamboat General Buell, at that time engaged in carrying the mail. To this indictment the defendants pleaded specially that Farris had been indicted for murder by a court of competent authority in Kentucky; that a bench warrant had been issued and

placed in the hands of the defendant Kirby, the sheriff of the county, commanding him to arrest Farris and bring him before the court to answer to the indictment; and that in obedience to this warrant, he and the other defendants, as his posse, entered upon the steamboat General Buell and arrested Farris, and used only such force as was necessary to accomplish that arrest. The question as to the sufficiency of this plea was certified to this court, and it was held that the arrest of Farris upon the warrant from the state court was not an obstruction of the mail, or the retarding of the passage of a carrier of the mail, within the meaning of the act. In its opinion the court says: "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter. The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law which enacted 'that whoever drew blood in the streets should be punished with the utmost severity,' did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling, cited by Plowden, that the statute of 1st Edward II., which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire, 'for he is not to be hanged because he would not stay to be burnt.' And we think that a like common sense will sanction the ruling we make, that the act of Congress which punishes the obstruction or retarding of the passage of the mail, or of its carrier, does not apply to a case of temporary detention of the mail caused by the arrest of the carrier upon an indictment for murder." The following cases may also be cited. *Henry* v. *Tilson*, 17 Vermont, 479; *Rye-gate* v. *Wardsboro*, 30 Vermont, 746; *Ex parte Ellis*, 11 California, 222; *Ingraham* v. *Speed*, 30 Mississippi, 410; *Jackson* v. *Collins*, 3 Cowen, 89; *People* v. *Insurance Company*, 15 Johns. 358; *Burch* v. *Newbury*, 10 N. Y. 374; *People* v. *N. Y.*

Commissioners of Taxes, 95 N. Y. 554, 558; *People* v. *Lacombe*, 99 N. Y. 43, 49; *Canal Co.* v. *Railroad Co.*, 4 G. & J., 1, 152; *Osgood* v. *Breed*, 12 Mass. 525, 530; *Wilbur* v. *Crane*, 13 Pick. 284; *Oates* v. *National Bank*, 100 U. S. 239.

Among other things which may be considered in determining the intent of the legislature is the title of the act. We do not mean that it may be used to add to or take from the body of the statute, *Hadden* v. *The Collector*, 5 Wall. 107, but it may help to interpret its meaning. In the case of *United States* v. *Fisher*, 2 Cranch, 358, 386, Chief Justice Marshall said: "On the influence which the title ought to have in construing the enacting clauses much has been said; and yet it is not easy to discern the point of difference between the opposing counsel in this respect. Neither party contends that the title of an act can control plain words in the body of the statute; and neither denies that, taken with other parts, it may assist in removing ambiguities. Where the intent is plain, nothing is left to construction. Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived; and in such case the title claims a degree of notice, and will have its due share of consideration." And in the case of *United States* v. *Palmer*, 3 Wheat. 610, 631, the same judge applied the doctrine in this way: "The words of the section are in terms of unlimited extent. The words 'any person or persons' are broad enough to comprehend every human being. But general words must not only be limited to cases within the jurisdiction of the State, but also to those objects to which the legislature intended to apply them. Did the legislature intend to apply these words to the subjects of a foreign power, who in a foreign ship may commit murder or robbery on the high seas? The title of an act cannot control its words, but may furnish some aid in showing what was in the mind of the legislature. The title of this act is, 'An act for the punishment of certain crimes against the United States.' It would seem that offences against the United States, not offences against the human race, were the crimes which the legislature intended by this law to punish."

It will be seen that words as general as those used in the first section of this act were by that decision limited, and the intent of Congress with respect to the act was gathered partially, at least, from its title. Now, the title of this act is, "An act to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States, its Territories and the District of Columbia." Obviously the thought expressed in this reaches only to the work of the manual laborer, as distinguished from that of the professional man. No one reading such a title would suppose that Congress had in its mind any purpose of staying the coming into this country of ministers of the gospel, or, indeed, of any class whose toil is that of the brain. The common understanding of the terms labor and laborers does not include preaching and preachers; and it is to be assumed that words and phrases are used in their ordinary meaning. So whatever of light is thrown upon the statute by the language of the title indicates an exclusion from its penal provisions of all contracts for the employment of ministers, rectors and pastors.

Again, another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body. *United States* v. *Union Pacific Railroad*, 91 U. S. 72, 79. The situation which called for this statute was briefly but fully stated by Mr. Justice Brown when, as District Judge, he decided the case of *United States* v. *Craig*, 28 Fed. Rep. 795, 798: "The motives and history of the act are matters of common knowledge. It had become the practice for large capitalists in this country to contract with their agents abroad for the shipment of great numbers of an ignorant and servile class of foreign laborers, under contracts, by which the employer agreed, upon the one hand, to prepay their passage, while, upon the other hand, the laborers agreed to work after their arrival for a certain time at a low rate of wages. The effect of this was to break down the labor market, and to reduce other laborers engaged in like occupations to the level

of the assisted immigrant. The evil finally became so flagrant that an appeal was made to Congress for relief by the passage of the act in question, the design of which was to raise the standard of foreign immigrants, and to discountenance the migration of those who had not sufficient means in their own hands, or those of their friends, to pay their passage."

It appears, also, from the petitions, and in the testimony presented before the committees of Congress, that it was this cheap unskilled labor which was making the trouble, and the influx of which Congress sought to prevent. It was never suggested that we had in this country a surplus of brain toilers, and, least of all, that the market for the services of Christian ministers was depressed by foreign competition. Those were matters to which the attention of Congress, or of the people, was not directed. So far, then, as the evil which was sought to be remedied interprets the statute, it also guides to an exclusion of this contract from the penalties of the act.

A singular circumstance, throwing light upon the intent of Congress, is found in this extract from the report of the Senate Committee on Education and Labor, recommending the passage of the bill: "The general facts and considerations which induce the committee to recommend the passage of this bill are set forth in the Report of the Committee of the House. The committee report the bill back without amendment, although there are certain features thereof which might well be changed or modified, in the hope that the bill may not fail of passage during the present session. Especially would the committee have otherwise recommended amendments, substituting for the expression 'labor and service,' whenever it occurs in the body of the bill, the words 'manual labor' or 'manual service,' as sufficiently broad to accomplish the purposes of the bill, and that such amendments would remove objections which a sharp and perhaps unfriendly criticism may urge to the proposed legislation. The committee, however, believing that the bill in its present form will be construed as including only those whose labor or service is manual in character, and being very desirous that the bill become a law before the adjournment, have reported the bill without

change." 6059, Congressional Record, 48th Congress. And, referring back to the report of the Committee of the House, there appears this language: "It seeks to restrain and prohibit the immigration or importation of laborers who would have never seen our shores but for the inducements and allurements of men whose only object is to obtain labor at the lowest possible rate, regardless of the social and material well-being of our own citizens and regardless of the evil consequences which result to American laborers from such immigration. This class of immigrants care nothing about our institutions, and in many instances never even heard of them; they are men whose passage is paid by the importers; they come here under contract to labor for a certain number of years; they are ignorant of our social condition, and that they may remain so they are isolated and prevented from coming into contact with Americans. They are generally from the lowest social stratum, and live upon the coarsest food and in hovels of a character before unknown to American workmen. They, as a rule, do not become citizens, and are certainly not a desirable acquisition to the body politic. The inevitable tendency of their presence among us is to degrade American labor, and to reduce it to the level of the imported pauper labor." Page 5359, Congressional Record, 48th Congress.

We find, therefore, that the title of the act, the evil which was intended to be remedied, the circumstances surrounding the appeal to Congress, the reports of the committee of each house, all concur in affirming that the intent of Congress was simply to stay the influx of this cheap unskilled labor.

But beyond all these matters no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people. This is historically true. From the discovery of this continent to the present hour, there is a single voice making this affirmation. The commission to Christopher Columbus, prior to his sail westward, is from "Ferdinand and Isabella, by the grace of God, King and Queen of Castile," etc., and recites that "it is hoped that by God's assistance some of the continents and islands in the

ocean will be discovered," etc. The first colonial grant, that made to Sir Walter Raleigh in 1584, was from "Elizabeth, by the grace of God, of England, Fraunce and Ireland, queene, defender of the faith," etc.; and the grant authorizing him to enact statutes for the government of the proposed colony provided that "they be not against the true Christian faith nowe professed in the Church of England." The first charter of Virginia, granted by King James I in 1606, after reciting the application of certain parties for a charter, commenced the grant in these words: "We, greatly commending, and graciously accepting of, their Desires for the Furtherance of so noble a Work, which may, by the Providence of Almighty God, hereafter tend to the Glory of his Divine Majesty, in propagating of Christian Religion to such People, as yet live in Darkness and miserable Ignorance of the true Knowledge and Worship of God, and may in time bring the Infidels and Savages, living in those parts, to human Civility, and to a settled and quiet Government; DO, by these our Letters-Patents, graciously accept of, and agree to, their humble and well-intended Desires."

Language of similar import may be found in the subsequent charters of that colony, from the same king, in 1609 and 1611; and the same is true of the various charters granted to the other colonies. In language more or less emphatic is the establishment of the Christian religion declared to be one of the purposes of the grant. The celebrated compact made by the Pilgrims in the Mayflower, 1620, recites: "Having undertaken for the Glory of God, and Advancement of the Christian Faith, and the Honour of our King and Country, a Voyage to plant the first Colony in the northern Parts of Virginia; Do by these Presents, solemnly and mutually, in the Presence of God and one another, covenant and combine ourselves together into a civil Body Politick, for our better Ordering and Preservation, and Furtherance of the Ends aforesaid."

The fundamental orders of Connecticut, under which a provisional government was instituted in 1638–1639, commence with this declaration: "Forasmuch as it hath pleased the Almighty God by the wise disposition of his diuyne pruidence

so to Order and dispose of things that we the Inhabitants and Residents of Windsor, Hartford and Wethersfield are now cohabiting and dwelling in and vppon the River of Conectecotte and the Lands thereunto adioyneing; And well knowing where a people are gathered togather the word of God requires that to mayntayne the peace and vnion of such a people there should be an orderly and decent Gouerment established according to God, to order and dispose of the affayres of the people at all seasons as occation shall require; doe therefore assotiate and conioyne our selues to be as one Publike State or Comonwelth; and doe, for our selues and our Successors and such as shall be adioyned to vs att any tyme hereafter, enter into Combination and Confederation togather, to mayntayne and presearue the liberty and purity of the gospell of our Lord Jesus wch we now p^r^fesse, as also the disciplyne of the Churches, wch according to the truth of the said gospell is now practised amongst vs."

In the charter of privileges granted by William Penn to the province of Pennsylvania, in 1701, it is recited: "Because no People can be truly happy, though under the greatest Enjoyment of Civil Liberties, if abridged of the Freedom of their Consciences, as to their Religious Profession and Worship; And Almighty God being the only Lord of Conscience, Father of Lights and Spirits; and the Author as well as Object of all divine Knowledge, Faith and Worship, who only doth enlighten the Minds, and persuade and convince the Understandings of People, I do hereby grant and declare," etc.

Coming nearer to the present time, the Declaration of Independence recognizes the presence of the Divine in human affairs in these words: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness." "We, therefore, the Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name and by Authority of the good People of these Colonies, solemnly publish and declare," etc.; "And for the sup-

port of this Declaration, with a firm reliance on the Protection of Divine Providence, we mutually pledge to each other our Lives, our Fortunes, and our sacred Honor."

If we examine the constitutions of the various States we find in them a constant recognition of religious obligations. Every constitution of every one of the forty-four States contains language which either directly or by clear implication recognizes a profound reverence for religion and an assumption that its influence in all human affairs is essential to the well being of the community. This recognition may be in the preamble, such as is found in the constitution of Illinois, 1870: "We, the people of the State of Illinois, grateful to Almighty God for the civil, political and religious liberty which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and transmit the same unimpaired to succeeding generations," etc.

It may be only in the familiar requisition that all officers shall take an oath closing with the declaration "so help me God." It may be in clauses like that of the constitution of Indiana, 1816, Article XI, section 4: "The manner of administering an oath or affirmation shall be such as is most consistent with the conscience of the deponent, and shall be esteemed the most solemn appeal to God." Or in provisions such as are found in Articles 36 and 37 of the Declaration of Rights of the Constitution of Maryland, 1867: "That as it is the duty of every man to worship God in such manner as he thinks most acceptable to Him, all persons are equally entitled to protection in their religious liberty; wherefore, no person ought, by any law, to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice, unless, under the color of religion, he shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others in their natural, civil or religious rights; nor ought any person to be compelled to frequent or maintain or contribute, unless on contract, to maintain any place of worship, or any ministry; nor shall any person, otherwise competent, be deemed incompetent as a witness, or juror, on account of his religious belief: *Provided*, He

believes in the existence of God, and that, under His dispensation, such person will be held morally accountable for his acts, and be rewarded or punished therefor, either in this world or the world to come. That no religious test ought ever to be required as a qualification for any office of profit or trust in this State other than a declaration of belief in the existence of God; nor shall the legislature prescribe any other oath of office than the oath prescribed by this constitution." Or like that in Articles 2 and 3, of Part 1st, of the Constitution of Massachusetts, 1780: "It is the right as well as the duty of all men in society publicly and at stated seasons, to worship the Supreme Being, the great Creator and Preserver of the universe. . . . As the happiness of a people and the good order and preservation of civil government essentially depend upon piety, religion and morality, and as these cannot be generally diffused through a community but by the institution of the public worship of God and of public instructions in piety, religion and morality: Therefore, to promote their happiness and to secure the good order and preservation of their government, the people of this commonwealth have a right to invest their legislature with power to authorize and require, and the legislature shall, from time to time, authorize and require, the several towns, parishes, precincts and other bodies-politic or religious societies to make suitable provision, at their own expense, for the institution of the public worship of God and for the support and maintenance of public Protestant teachers of piety, religion and morality in all cases where such provision shall not be made voluntarily." Or as in sections 5 and 14 of Article 7, of the constitution of Mississippi, 1832: "No person who denies the being of a God, or a future state of rewards and punishments, shall hold any office in the civil department of this State. . . . Religion, morality and knowledge being necessary to good government, the preservation of liberty, and the happiness of mankind, schools and the means of education, shall forever be encouraged in this State." Or by Article 22 of the constitution of Delaware, 1776, which required all officers, besides an oath of allegiance, to make and subscribe the following declaration: "I, A. B., do profess

faith in God the Father, and in Jesus Christ His only Son, and in the Holy Ghost, one God, blessed for evermore; and I do acknowledge the Holy Scriptures of the Old and New Testament to be given by divine inspiration."

Even the Constitution of the United States, which is supposed to have little touch upon the private life of the individual, contains in the First Amendment a declaration common to the constitutions of all the States, as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," etc. And also provides in Article 1, section 7, (a provision common to many constitutions,) that the Executive shall have ten days (Sundays excepted) within which to determine whether he will approve or veto a bill.

There is no dissonance in these declarations. There is a universal language pervading them all, having one meaning; they affirm and reaffirm that this is a religious nation. These are not individual sayings, declarations of private persons: they are organic utterances; they speak the voice of the entire people. While because of a general recognition of this truth the question has seldom been presented to the courts, yet we find that in *Updegraph* v. *The Commonwealth*, 11 S. & R. 394, 400, it was decided that, "Christianity, general Christianity, is, and always has been, a part of the common law of Pennsylvania; . . . not Christianity with an established church, and tithes, and spiritual courts; but Christianity with liberty of conscience to all men." And in *The People* v. *Ruggles*, 8 Johns. 290, 294, 295, Chancellor Kent, the great commentator on American law, speaking as Chief Justice of the Supreme Court of New York, said: "The people of this State, in common with the people of this country, profess the general doctrines of Christianity, as the rule of their faith and practice; and to scandalize the author of these doctrines is not only, in a religious point of view, extremely impious, but, even in respect to the obligations due to society, is a gross violation of decency and good order. . . . The free, equal and undisturbed enjoyment of religious opinion, whatever it may be, and free and decent discussions on any religious

subject, is granted and secured; but to revile, with malicious and blasphemous contempt, the religion professed by almost the whole community, is an abuse of that right. Nor are we bound, by any expressions in the Constitution as some have strangely supposed, either not to punish at all, or to punish indiscriminately, the like attacks upon the religion of *Mahomet* or of the Grand *Lama;* and for this plain reason, that the case assumes that we are a Christian people, and the morality of the country is deeply ingrafted upon Christianity, and not upon the doctrines or worship of those impostors." And in the famous case of *Vidal* v. *Girard's Executors*, 2 How. 127, 198, this court, while sustaining the will of Mr. Girard, with its provision for the creation of a college into which no minister should be permitted to enter, observed: "It is also said, and truly, that the Christian religion is a part of the common law of Pennsylvania."

If we pass beyond these matters to a view of American life as expressed by its laws, its business, its customs and its society, we find everywhere a clear recognition of the same truth. Among other matters note the following: The form of oath universally prevailing, concluding with an appeal to the Almighty; the custom of opening sessions of all deliberative bodies and most conventions with prayer; the prefatory words of all wills, "In the name of God, amen;" the laws respecting the observance of the Sabbath, with the general cessation of all secular business, and the closing of courts, legislatures, and other similar public assemblies on that day; the churches and church organizations which abound in every city, town and hamlet; the multitude of charitable organizations existing everywhere under Christian auspices; the gigantic missionary associations, with general support, and aiming to establish Christian missions in every quarter of the globe. These, and many other matters which might be noticed, add a volume of unofficial declarations to the mass of organic utterances that this is a Christian nation. In the face of all these, shall it be believed that a Congress of the United States intended to make it a misdemeanor for a church of this country to contract for the services of a Christian minister residing in another nation?

Syllabus.

Suppose in the Congress that passed this act some member had offered a bill which in terms declared that, if any Roman Catholic church in this country should contract with Cardinal Manning to come to this country and enter into its service as pastor and priest; or any Episcopal church should enter into a like contract with Canon Farrar; or any Baptist church should make similar arrangements with Rev. Mr. Spurgeon; or any Jewish synagogue with some eminent Rabbi, such contract should be adjudged unlawful and void, and the church making it be subject to prosecution and punishment, can it be believed that it would have received a minute of approving thought or a single vote? Yet it is contended that such was in effect the meaning of this statute. The construction invoked cannot be accepted as correct. It is a case where there was presented a definite evil, in view of which the legislature used general terms with the purpose of reaching all phases of that evil, and thereafter, unexpectedly, it is developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against. It is the duty of the courts, under those circumstances, to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute.

The judgment will be reversed, and the case remanded for further proceedings in accordance with this opinion.

In re COOPER, Petitioner.

ORIGINAL.

No. 6. Original. Argued November 9, 10, 1891. — Decided February 29, 1892.

The District Court for the District of Alaska has jurisdiction in admiralty to forfeit vessels for violating the provisions of Rev. Stat. § 1956 on any of the navigable waters of the United States which were acquired by the treaty with Russia, concluded March 30, 1857, 15 Stat. 539.

Syllabus.

Prohibition will not go after judgment and sentence, unless want of jurisdiction appears on the face of the proceedings; but, before judgment, the superior court can examine not simply the process and pleadings technically of record, but also the facts and evidence upon which action was taken.

United States District Courts, sitting in admiralty, are courts of superior jurisdiction, and every intendment is made in favor of their decrees; and when it appears that the court had jurisdiction of the subject matter and either that the defendant was duly served with process or that he voluntarily appeared and made defence, the decree is not open collaterally to any inquiry upon the merits or jurisdiction dependent on those facts.

On an application for a writ of prohibition, the inquiry being confined to the matter of jurisdiction, only the record proper should be looked into, and not documents and other evidence in addition to the record which may be sent up under the provisions of Rev. Stat. § 698.

The latter part of section 7 of the act of May 17, 1884, 23 Stat. 24, 26, may be read as follows: "And the final judgments and decrees of said District Court of Alaska may be reviewed by the Supreme Court of the United States as in other cases;" and, being so read, its meaning is that this court may review the final judgments or decrees of that court, as in cases of the same kind from other courts.

When a party aggrieved by a judgment has an appeal to this court which becomes inefficacious through his neglect, a writ of prohibition to prevent the enforcement of the judgment will not issue from this court.

The act of February 16, 1875, 18 Stat. 315, c. 77, § 1, applies to appeals taken from decrees of the District Court of the United States for the District of Alaska, sitting in admiralty.

At a time when a diplomatic correspondence was going on between the United States and Great Britain respecting the extent of the jurisdiction of the former in the waters of Behring Sea, a libel in admiralty was filed in the District Court of Alaska, alleging a seizure by the United States authorities of a vessel "within the limits of Alaska Territory, and in the waters thereof and within the civil and judicial District of Alaska," to wit: "Within the waters of that portion of Behring Sea belonging to the United States and said district, on waters navigable from the sea by vessels of ten or more tons burden," and charging that "the said vessel and her captain, officers and crew were then and there found engaged in killing fur seals within the limits of Alaska Territory and in the said waters thereof, in violation," etc. The findings of fact followed this description, and described the act complained of as done "within the waters of Alaska." No request was made to have the findings made more specific as to the place where the offence was committed. The vessel being condemned, the claimants appealed to this court. The appeal was duly entered and docketed, and was then dismissed on application of the appellant, who applied for leave to file an application for a writ of prohibition to restrain the court below from enforcing the sen-

tence or the decree of condemnation. Leave being granted, the petition was filed, and it is now *Held*,

(1) That the legal inference from the findings of fact is, that the act took place within the jurisdiction of the United States;

(2) That an appeal lay to this court from the decree of the District Court;

(3) That, the District Court having found the facts, this court would be limited, on appeal, to the consideration of the questions of law presented by the record;

(4) That the District Court on the pleadings and facts found had jurisdiction of the case, and the petitioner might have prosecuted an appeal; and that the appeal taken was insufficient for the petitioner's purposes, because of his neglect to have included in the findings the exact locality of the seizure;

(5) That for this reason the writ of prohibition should not issue: the court resting its denial of it on this ground, although it might have placed it upon the well settled principle that an application to a court to review the action of the political department of the government, upon a question pending between it and a foreign power, and to determine whether the government was right or wrong, made while diplomatic negotiations were still going on, should be denied.

THE court stated the case as follows:

This is an application for a writ of prohibition to the District Court of the United States for the District of Alaska, to restrain the enforcement of a sentence of forfeiture and condemnation entered in that court, September 19, 1887, on a libel filed by the United States against the schooner W. P. Sayward, upon the ground that that court was without jurisdiction in the premises. The petitioner, Cooper, is the owner of the vessel, and with his petition a suggestion was presented by Sir John Thompson, K. C. M. G., Her Britannic Majesty's Attorney General of Canada, with the knowledge and approval of the Imperial government of Great Britain, requesting the aid of the court for the claimant, a subject of her Britannic Majesty.

The motion for leave to file the application was made on the twelfth of January, 1891, and leave was granted on the second day of February. The application having accordingly been filed, a rule was issued against the judge of the District

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Court of Alaska to show cause why the writ should not go. The petition is set out *in extenso* in *In re Cooper, Petitioner*, 138 U. S. 404. The main averments are that the schooner W. P. Sayward, a British vessel, while lawfully sailing upon the high seas in latitude 44° 43′ north and longitude 167° 51′ west, and fifty-nine miles from any land whatsoever, was forcibly seized by an armed revenue vessel of the United States and forcibly carried into the port of Sitka, and there forcibly detained and delivered to the United States marshal, and by the attorney for the United States of the District of Alaska libelled in the District Court, and by said court condemned for having killed fur seal at the place of seizure. It was further averred that the decree of forfeiture was made and entered September 19, 1887; that the petitioner, having been admitted as the actual owner of the said schooner as claimant, appealed to this court April 26, 1888, and docketed said appeal here October 30, 1888, but dismissed the same, (January 12, 1891,) because advised that an appeal would not lie, and that the decree was and is a nullity; and that all the matters of fact alleged in the petition, save those of which this court takes judicial notice, appear by the record and proceedings of the District Court; and it was claimed in argument that the petitioner, having referred to the original record and proceedings of the District Court, was entitled to have the same read and considered as part of his case in this court, and he accordingly filed a complete and authenticated transcript of the entire proceedings in the District Court, as he alleged.

A return was made in due course by John S. Bugbee, judge of the court in question, stating that he was not such judge at the time the decree was entered, but was appointed and qualified on December 7, 1889, and he thereupon sets forth "the final record of the cause in which said decree of forfeiture was made and entered, as prepared under section 750 of the Revised Statutes of the United States from the files, minutes and journal of said District Court of the United States, District of Alaska," as follows:

The libel dated and filed September 13, 1887:

"The libel of information of M. D. Ball, attorney of the

United States, for the District of Alaska, who prosecutes on behalf of the said United States in the name and on behalf of the said United States, alleges and informs as follows, to wit:

"That L. G. Shepard, an officer in the revenue marine service of the United States, duly commissioned by the President of the United States, in command of the United States revenue cutter Rush, and on special duty in the waters of the District of Alaska, heretofore, to wit, on the 9th day of July, A.D. 1887, within the limits of Alaska Territory and in the waters thereof, and within the civil and judicial district of Alaska, to wit, within the waters of that portion of Behring Sea belonging to the United States and said district, on waters navigable from the sea by vessels of ten or more tons burden, seized the schooner W. P. Sayward, of Victoria, B. C., her tackle, apparel, boats, cargo and furniture, being the property of some person or persons unknown to said attorney.

"The property is more particularly described as follows, to wit: Schooner W. P. Sayward, of Victoria, B. C., of 59 and $\frac{79}{100}$ tons burden, as per register, standing and running rigging, sails, chronometer, and nautical instruments, clock, lamps, carpenter's tools, books, two anchors, casks, cooking and table utensils, provisions and 477 fur-seal skins and all other property found upon or appurtenant to said schooner.

"That L. G. Shepard was then and there duly commissioned and authorized by the proper department of the United States to make said seizure.

"That all said property was then and there seized as forfeited to the United States for the following causes:

"That the said vessel and her captain, officers and crew were then and there found engaged in killing fur seals within the limits of Alaska Territory, and in the said waters thereof, in violation of section 1956 of the Revised Statutes of the United States; that all the said property, after being seized as aforesaid, was brought into the port of Sitka, in said district, and turned over to the United States marshal of this district, with the exception of the 477 fur-seal skins, which latter were brought into the port of Oonalaska, in said Territory, and delivered into the keeping of Isaac Anderson, a deputy United

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States marshal of this district, and all of said property is now within the judicial district of Alaska, United States of America; and said M. D. Ball, attorney as aforesaid, further informs and alleges that on the 9th day of July, A.D. 1887, Geo. R. Ferry and certain other persons whose names are to the said United States attorney unknown, who were then and there engaged on board of said schooner W. P. Sayward as seamen and seal hunters, did, under the directions and by the authority of Geo. R. Ferry, then and there master of said schooner, engage in killing and did kill, in the Territory and District of Alaska and in the waters thereof, thirty fur seals, in violation of section 1956 of the Revised Statutes of the United States in such cases made and provided.

"That the said 477 fur-seal skins and other goods so seized on board the schooner W. P. Sayward constituted the cargo of said schooner at the time of the killing of said fur-seals and at the time of said seizure.

"And said attorney saith that all and singular the premises were and are true, and within the admiralty and maritime jurisdiction of the United States and of this honorable court, and that by reason thereof and by force of the statutes in such cases made and provided, the aforementioned schooner, being a vessel of 59.79 tons burden, and her said apparel, tackle, boats, cargo and furniture became and are forfeited to the use of the United States.

"Wherefore, the said attorney prays that the usual process and monition of this honorable court issue in this behalf against said schooner and all said hereinbefore described property to enforce the forfeiture thereof, and requiring notice to be given to all persons to appear and show cause on the return day of said process why said forfeiture should not be decreed, and that after due proceedings are had all said property be adjudged, decreed and condemned as forfeited to the use of the United States, and for such other relief as may be proper in the premises."

The monition dated September 15, 1887, and returned and filed September 19, 1887; and the return.

Order of court of September 15, 1887, granting leave to the

proctor for claimants to file claim of master for owner and the claim; also order granting leave to proctor for claimants to file a demurrer to the libel; and the demurrer.

Order of court overruling the demurrer on the same day and leave granted to file answer; and the answer:

"And now comes George R. Ferry, master, as aforesaid, and for answer to the libel of information filed herein, says:

"1st. He admits that L. G. Shepard was an officer of the United States revenue marine service, duly commissioned, and that he was, at the time the property proceeded against herein was seized, in command of the United States revenue-cutter Rush and on official duty at the time the said seizure was made, and was then and there duly commissioned and authorized by the proper department of the United States to make said seizure, but denies that said seizure was made within the waters of Alaska Territory or within the civil and judicial district of Alaska or in any portion of Behring Sea belonging to the United States, or upon any other waters belonging to libellants navigable from the sea by vessels of ten tons or over.

"2nd. Denies that said vessel, her captain, officers, and crew, were then and there found engaged in killing fur seals within the limits of Alaska Territory, or in the waters thereof, or that they were then and there violating any law of the United States.

"3rd. Denies that on the ninth day of July, A.D. 1887, any other person or persons did then and there, under the direction and authority of the said George R. Ferry, or any other person, or at all, kill any fur seal within the District of Alaska, or in the waters thereof.

"4th. Denies that the property proceeded against in this cause, or any portion thereof, ever became forfeited to the United States; wherefore the said claimant prays that the libel of information filed herein may be dismissed, and for any other just and equitable relief as to this court may seem meet and proper."

September 19, 1887, leave granted proctor for owners to file a waiver of the publication and posting of the notice of the

libel and seizure of the property granted, and waiver filed the same day:

"And now comes W. Clark, Esq., proctor for the owners of the above-named schooner, as appears by their claim filed herein, and on behalf of said owners, and being authorized thereto, waives said owners' right to publication and posting of the notice of the libel and seizure of the property being proceeded against in this cause, and waives also time of hearing, and announces himself ready to proceed to trial."

Record entry of September 19, 1887:

"This cause having been tried and submitted, the court, from the evidence, finds the following facts and conclusions of law:

"1st. That on the 9th day of July, 1887, and theretofore, the master and crew of the defendant vessel were engaged in killing and did kill fur seals in that portion of Behring Sea ceded by Russia to the United States by the treaty of March, 1867, and within the waters of Alaska, in violation of section 1956 of the Revised Statutes of the United States, and that the promiscuous shooting of fur-bearing animals in the waters adjacent to the islands of St. Paul and St. George and in that portion of Behring Sea east of 193d degree of west longitude has a tendency to frighten and prevent the said animals from going upon these islands, as they have been accustomed to in the past.

"2d. That on the said 9th day of July, 1887, said vessel, her furniture, apparel, tackle, cargo and 477 fur-seal skins were seized in said waters by the commanding officer of the United States revenue-cutter Rush, then and there engaged in the revenue marine service of the United States.

"3d. That said commanding officer was duly commissioned by the President of the United States, and made such seizure under the direction and by the authority of the Treasury Department of the United States.

"4th. That said property so seized was delivered by said commanding officer of said cutter to the United States marshal of the District of Alaska, and is now within the jurisdiction of the court.

"As conclusions of law, the court finds that the plaintiff is entitled to a decree of forfeiture against said vessel, her tackle, apparel, furniture, cargo and the said 477 fur-seal skins."

Motion in arrest of decree, filed September 19, 1887:

"At this time comes W. Clark, proctor for claimants, and moves the court to arrest the decree of forfeiture in the said cause for the following reasons, to wit:

"1st. That the libel of information herein does not state facts sufficient in law to enable the United States to have and maintain this action for the forfeiture of the property seized herein.

"2d. That the evidence produced on the part of the United States in this cause is not sufficient upon which to base a decree of forfeiture.

"3d. That from the evidence produced on the part of the United States it appears that this court has no jurisdiction over the subject-matter of this cause.

"4th. That the act of Congress under which the seizure herein was made is contrary to the spirit of international law, and *ultra vires*, in that it purports to give the United States jurisdiction over a portion of the high seas more than three marine leagues from its shores, and purports to establish an international boundary line in mid-ocean with no definite terminal points and impossible to determine by absolute measurement or clearly define by marks.

"Therefore claimants pray that said decree may be forever arrested and this cause dismissed."

Order denying motion, and decree of September 19, 1887:

"The marshal having returned on the monition issued to him in the above-entitled action that in obedience thereto he had attached the said schooner W. P. Sayward, her tackle, apparel, boats, cargo and furniture, and proctor for claimants, on behalf of said owners, having waived said owners' right to publication and posting of the notice of the libel and seizure, and also time of hearing, and has given due notice to all persons claiming the same to appear before this court on the 19th day of Sept., 1887, at 11 o'clock A.M., at the District of Alaska, United States of America, then and there to interpose

their claims and make their allegations in that behalf, and Geo. R. Ferry, the captain of said vessel, having heretofore filed a claim to all of said property on behalf of J. D. Warren and Andrew Laing, of Victoria, B. C., and no other persons having appeared and no other claims or allegations having been made or filed by any other person or persons, and the usual proclamation having been made, and said cause having been heard this day by consent of parties, on the pleadings and proofs, M. D. Ball, Esq., U. S. dist. atty., by A. K. Delaney, Esq., of counsel in that behalf, appearing as advocate for said libellant, and W. Clark, Esq., as advocate for said claimants, and said cause having been submitted to the court for decision, and due deliberation being had in the premises, and the court having filed his findings and conclusions of law herein, it is now thereupon ordered, sentenced and decreed as follows:

"1st. That all persons whosoever, other than said claimants be, and they are hereby, decreed in contumacy and default.

"2d. That said schooner W. P. Sayward, her tackle, apparel, boats, and furniture, and her cargo of 477 fur-seal skins, now in the custody of the deputy U. S. marshal at Oonalaska, and all property found upon or appurtenant to said schooner be, and the same are hereby, condemned as forfeited to the use of the United States.

"3d. That unless an appeal be taken to this decree within the time limited and prescribed by law and the rules of court, the usual writ of *venditioni exponas* will be issued to the marshal, commanding him to sell all the said property and bring the proceeds unto this court, to be distributed according to law. Costs to be taxed and are awarded against said claimants."

Motion for a stay of proceedings dated October 3, 1887, and filed and overruled December 9, 1887; motion for a stay of three months considered and overruled same day; motion for leave to appeal filed and granted same day; motion to renew leave to appeal made and overruled April 14, 1888, but subsequently granted April 16. April 19, 1888, motion for leave to file stipulation and consent that vessel be thereupon

discharged, and order to that effect upon stipulation filed and approved, as follows:

"Whereas a libel of information was filed in the within cause on the 13th day of September, 1887, in the above court, by the honorable M. Ball, U. S. district attorney for the District of Alaska, against the schooner W. P. Sayward, her tackle, apparel, furniture and cargo, for the reasons and causes in said libel mentioned and set forth; and whereas a decree of forfeiture was on the 19th day of September, 1887, rendered against the said vessel, her tackle, apparel, furniture, and cargo, and against Thomas Henry Cooper, of San Francisco, intervening as the sole and only claimant to said vessel, tackle, apparel, furniture and cargo; and whereas the said vessel, tackle, apparel, furniture and cargo, are now in the custody of the U. S. marshal for the said District of Alaska under process issued from this court, and in pursuance of the prayer of the said libel; and whereas the value of the said vessel, her tackle, apparel, furniture and cargo, has been appraised at $7289.50, as appears by the report of the appraisers duly appointed and sworn by this court, and on file herein; and whereas the said Cooper, claimant as aforesaid, is desirous of, and purposes, appealing from the said decree of this honorable court:

"Now, therefore, we the undersigned, the stipulators, submitting ourselves to the jurisdiction of this court, do acknowledge ourselves to be bound unto the United States of America, the said claimant, Thomas Henry Cooper, as principal, and Bailey Gatzert and Jacob Furth as sureties, jointly and severally, in the sum of $7289.50, lawful money of the United States, hereby consenting and agreeing that a summary decree may be rendered against us, and each of us, for the above appraised value, with interest thereon from this date, and that execution may thereon issue against our goods, chattels and lands for the payment thereof or any part thereof which shall be ordered or decreed: Upon condition, nevertheless, that if the undersigned stipulators shall prosecute their said appeal without unnecessary delay, and abide by any final decree that may be rendered by the Supreme Court of the United States

of America, to which this cause may be appealed, and in the event of the said decree of this honorable court being affirmed by such court of appellate jurisdiction, then if said stipulators pay the amount named in this stipulation into this court this stipulation to be void, otherwise to remain in full force and virtue."

Bond for costs on appeal filed and approved, and April 27, 1888, leave granted to file affidavit on appeal, and appeal to the Supreme Court of the United States granted, and affidavit of James Douglas Warren, as agent for the claimant, and petition for appeal filed, and appeal allowed.

July 18, 1888, record amended so as to substitute the name of Cooper as owner for that of Warren.

The return of the District Judge thus concludes:

"Respondent further says that he is in receipt of an uncertified copy of the dismissal of the appeal taken to the Supreme Court from said decree of condemnation.

"Further answering, respondent says that he is advised that in determining his power and duty to enforce said decree as judge of said District Court of the United States, District of Alaska, he is limited to and concluded by an examination of the final record of the admiralty proceeding in which such decree was entered, as set out above in accordance with section 750 of the Revised Statutes of the United States. And he is further advised that this court in considering whether a writ should issue against him to prohibit him from enforcing said decree, is in like manner limited to and concluded by said record as above disclosed. Respondent respectfully submits that upon such record the District Court of the United States, District of Alaska, had full jurisdiction to make and enter the decree, and that it is the duty of this respondent to enforce such decree upon receiving the mandate from the Supreme Court issued in due course upon the dismissal of the appeal. Because of this record respondent is advised that all other facts stated in the petition accompanying the rule to show cause served upon this respondent are irrelevant and incompetent, and need not be answered by him.

"Respondent respectfully submits to the consideration of

the court whether upon the foregoing allegations of this return the writ of prohibition should issue against him."

It is contended by the petitioner's counsel that the return is on its face improper and insufficient: *First*, because the respondent was bound, if he submitted "anything disclosed by the files, journal and minutes of his court for the consideration of this court," to submit everything. *Second*, because the record returned by respondent, as prepared under section 750, Revised Statutes, is not authenticated "in any manner known to the law and cannot be noticed by the court." *Third*, because the respondent had "no right to decide for himself without allowing this court the opportunity to examine the correctness of his decision, as matter of law, that any facts stated in a petition accompanying a rule to show cause, issuing out of this court and served upon said judge, are 'irrelevant and incompetent.'" *Fourth*, because the record is on its face incomplete, since it shows a motion in arrest of judgment filed and overruled, and the evidence on file was properly a part of said motion. *Fifth*, because the record set out in the return "does not show jurisdiction in the District Court to make and enter a decree of forfeiture against the W. P. Sayward, but does show that said court had no jurisdiction to make and enter said decree."

Mr. Joseph H. Choate and *Mr. Calderon Carlisle* for the petitioner.

The question of this court's jurisdiction to issue the writ in this case is no longer open, as it has been adjudicated at the former hearing. *In re Cooper*, 138 U. S. 404, 414.

The case as now presented involves, at the outset and as preliminary to the main question, the consideration of two propositions, which may be stated as follows: (1) In determining whether or not the said court had jurisdiction, is this court limited to the examination of any particular portion of the record, or is its examination coextensive with the examination and acts of the condemning court? (2) Does an examination of the entire record and proceedings affirmatively establish the facts set forth in the petition for the writ?

Argument for Petitioner.

I. In determining the question of jurisdiction in the court below, is the examination by this court limited to any particular portion of the proceedings, or is the examination coextensive with the examination and acts of the condemning court?

The issuing of writs of prohibition is part of the appellate jurisdiction of this court, and in its exercise, the superior court not only may but must, it is submitted, revise and review the whole proceedings of the inferior court of admiralty. The same matter, showing want of jurisdiction, which may be averred before sentence, as good ground of prohibition, must, if proved in the proceedings of the inferior court furnish good ground for prohibition after sentence. This is well illustrated by comparing the case of *The Cassius*, 2 Dall. 365, with that of *The Exchange*, 7 Cranch, 116.

It was urged, at the former argument upon motion for leave to file, that the phrase "the face of the proceedings" meant the libel, or pleadings, at most, and not the entire proceedings, and several early English cases were cited as supporting that view, but it is submitted that they do not, in any sense, so incline. On the contrary, that the court will examine the entire proceedings and pass upon all questions going to the jurisdiction of the court below, upon which that court did or could pass, abundantly appears by a series of decisions, the accuracy of which has never been questioned, and the authority of which is undoubted. *Jones* v. *Owens*, 5 Dowl. & L. 669; *Marsden* v. *Wardle*, 3 El. & Bl. 695; *Thompson* v. *Ingham*, 14 Q. B. 710; *King* v. *Broom*, 12 Mod. 134; *Elston* v. *Rose*, L. R. 4 Q. B. 5; *S. C. sub nom. Elstone* v. *Rose*, 9 B. & S. 509; *Hunt* v. *North Staffordshire Railway*, 2 H. & N. 451; *Ex parte Heyworth*, 14 Q. B. D. 49; *Brown* v. *Cocking*, 9 B. & S. 503; *Jones* v. *Currey*, 2 Lowndes, Max. & Poll. 474; *Joseph* v. *Henry*, 1 Lowndes, Max. & Poll. 388; *Mayor of London* v. *Cox*, L. R. 2 H. L. 239.

Upon these authorities, and upon the principles of common sense, it must therefore be admitted that a superior court has the power, right and duty to examine all matters touching the question of jurisdiction which were before the court below, and that it can never be said that in a case where the

important question of the jurisdiction of a court is involved a superior court can solemnly adjudicate, from a view of one part of the proceedings, that the court below had or had not jurisdiction, when, by turning a leaf in its record, the contrary would conclusively appear.

II. Upon the face of the proceedings all the facts averred in the petition fully appear. The record nowhere discloses that the Sayward was ever, at any time prior to the seizure, at a closer proximity to any shores of the United States than ten miles; and there is no evidence of the killing of seal by the master or crew of the vessel at any particular place. The positions of the vessel are given in her log, and upon reference to the official map of the Coast and Geodetic Survey, as shown by the certificate of the officer in charge thereof, the nearest of said positions to any land was ten miles, and the pass of the four mountains through which she entered the Behring Sea is twenty-two miles wide between land at its narrowest point.

In this connection the language of this court applicable to fancied evidence becomes appropriate: "The rule in such cases is, that if there be a total defect of evidence to prove the essential fact, and the court find it without proof, the action of the court is void." *Lamp Chimney Co.* v. *Brass & Copper Co.*, 91 U. S. 656, 659. And, as said in *Brown* v. *Cocking*, 9 B. & S. 503, 509, a case of prohibition before referred to, "if it decides without evidence that a case is within its jurisdiction . . . this court will interfere."

The petitioner's case is not weakened by the narrower contention as to the face of the proceedings made by the respondent in his return to the rule. That this vessel was a British vessel, appears on the face of the libel wherein she is described as "schooner W. P. Sayward of Victoria, B. C., of 59 and $\frac{79}{100}$ tons burden as per register." That the place of seizure and the place of the offence was on the high seas appears on the face of this so-called final record. The libel alleged that said seizure was made "within the waters of that portion of Behring Sea belonging to the United States," and that the vessel, her captain and crew, were "then and there" found

engaged in killing fur seals "in said waters." It is confidently submitted, as matter of law, that no portion of Behring Sea belongs to the United States.

III. When Congress, in section 1956 of the Revised Statutes, speaks of "Alaska Territory and the waters thereof," it can only mean (as far as the sea is concerned) three miles or a marine league from the shore of the continent of America, or from the shores of one of the adjacent islands, which is all that can be claimed under treaty or the law of nations.

The amendatory act of March 3, 1889, does not in any way enlarge the effect of section 1956, because we can get no light on the meaning of the words "all the dominion of the United States in the waters of Behring Sea" from the words of the treaty, and because the law of nations limits the "dominion" of any nation in the waters of any sea to three miles or a marine league from the shore.

Assuming that the court is bound to follow and execute the law as laid down by Congress, it still remains clear that Congress never contemplated the exclusion of the vessels of other nations from the right of navigation and fishing outside of our territorial waters bounded by the marine league, and that there was no law for the seizure by the Secretary of the Treasury of a British vessel so engaged. From the public proceedings of the two Houses of Congress, it appears that the Senate distinctly refused to define the extent of the dominion of the United States in Behring Sea, and that the House consented to abandon its purpose to define that extent by municipal law; while the act of Congress of March 3, 1889, representing the final determination of Congress not to undertake to define the extent of the dominion of the United States in Behring Sea was approved by the President.

IV. The Sayward, being a British vessel, was exempt on the high seas, fifty-nine miles from land, from the jurisdiction of the United States, its laws and its courts. 1 Phil. Int. Law, 364; Wheaton's Int. Law, 119; *The Exchange*, 7 Cranch, 116; *The Santissima Trinidad*, 7 Wheat. 283; *Crapo* v. *Kelly*, 16 Wall. 610; *Wilson* v. *McNamee*, 102 U. S. 572; Lawrence's Wheaton, 266, n.; *Le Louis*, 2 Dodson, 210; *The Antelope*, 10

Wheat. 66; Dana's Wheaton, 258, n.; Mr. Webster to Lord Ashburton, (1842), 6 Webster's Works, 320; Wharton's Dig. Int. Law, pp. 106 to 110.

V. The power and duty of this court to decide whether the Alaska court had or had not jurisdiction, cannot be affected by any action of the executive. The political departments of the government having before them the question of "the extent of the dominion of the United States in the Behring Sea," which they could, doubtless, by conjoint action have determined so as to bind the courts, have chosen neither to determine the extent of the dominion of the United States nor to make any provision of law by which that extent is to be determined by the executive. The determination of that extent is, therefore, by the Constitution and laws of the United States made a duty of this court in the case at bar, involving the legality of the seizure and condemnation of a foreign vessel, alleged to be in violation of the law of nations, and without any warrant of any law of the United States.

The question of the legality of the seizure of British vessels in Behring Sea by the United States is a question of law, not only under the law of nations, but under the municipal law of the United States. The judiciary is not asked to overrule the executive and Congress in a position which they have taken towards Great Britain, but to do, what it cannot avoid doing in a case involving private right — to construe acts of Congress and a treaty, which are all parts of the supreme law of the land, and which leave to its construction the true meaning of the words, "the Territory of Alaska and the waters thereof" and "dominion of the United States in Behring Sea." With the broader international question this court is not asked by counsel for petitioner to concern itself; and even that is a matter not between the United States and Great Britain, but between the United States and the civilized world, before which the Congress of the United States has distinctly refused to assert, by the mere force of a municipal law, any extent of dominion not recognized by the law of nations.

While it is plain that within its lawful sphere the executive cannot be either superseded or overruled by this court, it can-

not be admitted that this court can decline to issue the writ, because its issuance, according to law, might affect some contention of the executive. *Cohens* v. *Virginia*, 6 Wheat. 264; *Ex parte Milligan*, 4 Wall. 2.

This court has had to deal with the action of executive departments in many cases. *Gelston* v. *Hoyt*, 3 Wheat. 246; *Williams* v. *Suffolk Insurance Co.*, 13 Pet. 415; *Kennett* v. *Chambers*, 14 How. 38, as to the recognition of a new State: *United States* v. *Palmer*, 3 Wheat. 610; *The Divina Pastora*, 4 Wheat. 52, as to a civil war in another country: *Foster* v. *Neilson*, 2 Pet. 253; *Garcia* v. *Lee*, 12 Pet. 511, as to boundaries: *Frelinghuysen* v. *Key*, 110 U. S. 63; *Alling* v. *United States*, 114 U. S. 562; *Jones* v. *United States*, 137 U. S. 202; *United States* v. *Rauscher*, 119 U. S. 407, as to the Secretary of State and funds in that department: *United States* v. *Holliday*, 3 Wall. 407, as to the Secretary of the Interior: *Merritt* v. *Welsh*, 104 U. S. 694; *Morrill* v. *Jones*, 106 U. S. 466, as to the Secretary of the Treasury.

The application before this court is not an attempted proceeding against the United States. This court is not asked to control or direct or interfere with the executive in the performance of any duty imposed by the Constitution or the laws. It is not asked to send its process to any of the officers or agents of the executive. It is asked for a judicial writ to be directed to the District Court of Alaska, in accordance with the special authority given by the laws of the United States. The only question now before the court is, shall this writ issue? The right of the executive to deal with persons and property can never, under the Constitution of the United States, be a political question. *Little* v. *Barreme*, 2 Cranch, 170.

Without the clear authority of a law of Congress, the executive can never, by determining a so-called political question, or by construing an act of Congress or a treaty, conclude the rights of persons or property, under the protection of the Constitution and laws of the United States, or conclude the courts of the United States, in a determination of these rights. *Little* v. *Barreme*, *ubi sup.*; *United States* v. *Rauscher*, 119 U. S. 407, 418.

VI. No action heretofore taken by the United States government amounts to an assertion of any sovereignty in the United States, which would give jurisdiction to its courts over any portion of the Behring Sea or the wild animals therein, beyond a marine league from any shores of the United States.

Not only does the diplomatic correspondence of the United States fail to disclose such an assertion of sovereignty or definiteness of position with respect to this question, as would preclude the court from giving to it original examination, but the right of the court to examine and the propriety of its determining this question has been expressly acknowledged and definitely preferred by that very department of the government.

VII. It is earnestly insisted that the allegation in the diplomatic correspondence of the United States of the admission by Great Britain of any exclusive jurisdiction of Russia in Behring Sea cannot, in the absence of an act of Congress or a treaty, affect the legality of this seizure and condemnation, even if the allegation were well founded. The allegation and contention of the United States in this respect are, however, without foundation.

The contention, advanced for the first time by the United States in this controversy, after an acquiescence of more than sixty-five years in the world's construction of the treaties of 1824 and 1825, that the phrase "Pacific Ocean," as used in those treaties, was not intended to include, and did not include the body of water which is now known as the Behring Sea, because the words "Behring Sea" were not used in either treaty, is absolutely without foundation; and yet the amazing concession is made by the United States that, "if Great Britain can maintain her position that the Behring Sea at the time of the treaties with Russia of 1824 and 1825, was included in the Pacific Ocean, the government of the United States has no well grounded complaint against her."

It is said that Great Britain herself enjoys an exclusive fishery for pearls in Australian waters under a municipal law providing for its protection, but until that law is sought to be enforced against the vessels of some friendly nation in

time of peace, it certainly cannot be cited as authority for the subject in hand; and even if Great Britain should resort to force against foreign nations in support of its claim, such a circumstance would not justify the legality of the present seizure, for courts do not administer laws in that way. They administer justice as based upon recognized rules of law. But the fact is that the special act in question, by its own terms, expressly limits its provisions to British ships, and boats attached to British ships.

VIII. The defect of jurisdiction in the District Court was not waived, and no act of the parties could cure such defect or confer jurisdiction.

The judicial power of the United States is limited not alone with reference to the States of the Union, but also with reference to the nations of the earth; not only by the Constitution of the United States, but by the principles of the law of nations, recognized by our Constitution and laws. In the words of Chief Justice Marshall: "The law of nations is the law of all tribunals in the society of nations."

We deny that the judicial power of the United States extends to the trial and condemnation of a British vessel, wrongfully seized in time of peace on the high seas, fifty-nine miles from land.

We deny that the forcible bringing in to the limits of a district of the United States of such vessel, so unlawfully seized, can enlarge or extend the judicial power of the United States.

We deny that any act of the United States' executive officers, from the President to the lowest, — that any act of the officers of a court of the United States, or that any act of the court itself, could make the judicial power of the United States extend to such a case.

The proceedings of the inferior court of admiralty are before this court for a single purpose — to see if that court has proceeded without jurisdiction or in excess of jurisdiction. The test is well stated by Mr. Justice Miller in the case of *Cooper* v. *Reynolds*, 10 Wall. 308. The court will examine the facts of this case as they appear on the face of the proceedings, for there are no presumptions in favor of the jurisdic-

tion of the courts of the United States. *Ex parte Smith*, 94 U. S. 455, 456.

The District Court of Alaska never had lawful jurisdiction of the vessel. No instance court of admiralty of the United States can gain any jurisdiction of a foreign vessel by a seizure which the United States, the sovereignty that created the court, could not authorize, and which, as a matter of fact, was not authorized any more by the laws of the United States than by the law of nations.

It is confidently submitted that in the case of this foreign vessel so seized, the trespass is so connected with the subsequent seizure by the civil authority under process of the District Court, as to annul the proceedings of that court against the vessel. "A seizure is a single act, and not a continuous fact. Possession, which follows seizure, is continuous." *Thompson* v. *Whitman*, 18 Wall. 451, 471.

While it is admitted that the vessel was actually in the port of Sitka when the libel was filed and the monition served, it is confidently denied that she was within the jurisdiction of the court of Alaska. In such a case appearance and pleading to the merits cannot confer jurisdiction. *Rhode Island* v. *Massachusetts*, 12 Pet. 657. And objections to the jurisdiction when they go to the subject matter and not to the form merely of its presentation or to the character of the relief prayed are not waived because they were not made in the lower court. *Boom Co.* v. *Patterson*, 98 U. S. 403; *Ex parte Bradley*, 7 Wall. 364.

IX. There is no provision for the review of the Alaska admiralty court except by the writ of prohibition.

It has repeatedly been held by this court that there can be no review by appeal here unless it is expressly given by an act of Congress, and that statutes providing for such appeal cannot be enlarged by implication. *Crawford* v. *Points, Assignee*, 13 How. 11; *The Lucy*, 8 Wall. 307; *Butterfield* v. *Usher*, 91 U. S. 246.

So that no greater right of appeal can be construed out of this act than its terms directly express, and whatever may have been formerly held, it is now the established doctrine of

this court that the right of appeal must be expressly given or it does not exist.

We submit, as the result of a careful examination of all the statutes bearing on the subject, that the clear and necessary construction of the final clause of section 7, of the Alaska act, is that the appeals shall lie, as in other cases they are allowed from the decrees and final judgments of District Courts, and of District Courts acting as Circuit Courts; and while this does not give a large and extensive right of appeal, the right of appeal direct from the District Court of Alaska in admiralty cases, other than prize, to this court has been omitted and denied.

In submitting to this august tribunal a case involving the legality, under the laws of our own country, of an act of the executive, counsel cannot refrain from quoting the language in which this court has announced the fundamental principle which must govern its decision in this aspect of the case.

"No man in this country," says this court, in *United States* v. *Lee*, 106 U. S. 196, 220, "is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it. It is the only supreme power in our system of government; and every man, who, by accepting office, participates in its functions, is only the more strongly bound to submit to the supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives."

Unless the laws of the United States admit of no other construction, it is confidently submitted that they will not be held to justify a seizure and condemnation that violate all the principles of international law which the United States have steadily maintained against all the nations of the earth, from the beginning of their existence.

Mr. Attorney General and *Mr. Solicitor General* opposing.

Mr. Chief Justice Fuller delivered the opinion of the court.

By section one of the act of Congress of May 17, 1884, entitled "An act providing a civil government for Alaska," (23 Stat. 24, c. 53,) it is provided "that the territory ceded to the United States by Russia by the treaty of March thirtieth, eighteen hundred and sixty-seven, and known as Alaska, shall constitute a civil and judicial district, the government of which shall be organized and administered as hereinafter provided. The temporary seat of government of said district is hereby established at Sitka."

The first part of section three is as follows:

"That there shall be, and hereby is, established a District Court for said district, with the civil and criminal jurisdiction of District Courts of the United States, and the civil and criminal jurisdiction of District Courts of the United States exercising the jurisdiction of Circuit Courts, and such other jurisdiction, not inconsistent with this act, as may be established by law."

Under this section the court thus established acquired all the admiralty jurisdiction within the District of Alaska belonging to District Courts of the United States. *The City of Panama*, 101 U. S. 453.

Section 688, Revised Statutes, provides: "The Supreme Court shall have power to issue writs of prohibition to the District Courts when proceeding as courts of admiralty and maritime jurisdiction." And although we were of opinion when the application for the rule was made, and subsequently held, (*McAllister* v. *United States*, 141 U. S. 174,) that the District Court for Alaska was not one of the courts mentioned in Article III of the Constitution, declaring that the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress shall from time to time establish, we nevertheless concluded that where the District Court of Alaska was acting as a District Court of the United States and, as such, proceeding in admiralty, it came within that section, and this court had power to issue the writ of prohibition to that court in a proper case; and as the questions involved could be, in our judgment, more satisfactorily presented upon a return, we granted the rule. *In re Cooper, Petitioner*, 138 U. S. 404.

The writ thus provided for by section 688 is the common law writ, which lies to a court of admiralty only when that court is acting in excess of, or is taking cognizance of matters not arising within, its jurisdiction. Its office is to prevent an unlawful assumption of jurisdiction, and not to correct mere errors and irregularities. *Ex parte Gordon*, 104 U. S. 515; *Ex parte Ferry Company*, 104 U. S. 519.

Whether the granting or refusal of the writ is discretionary or demandable of right has been much debated.

As remarked by Mr. Justice Gray in *Smith* v. *Whitney*, 116 U. S. 167, 173, it may be said to be discretionary, "where there is another legal remedy, by appeal or otherwise, or where the question of the jurisdiction of the court whose action is sought to be prohibited is doubtful, or depends on facts which are not made matter of record, or where a stranger, as he may in England, applies for the writ of prohibition. But where that court has clearly no jurisdiction of the suit or prosecution instituted before it, and the defendant therein has objected to its jurisdiction at the outset, and has no other remedy, he is entitled to a writ of prohibition as a matter of right; and a refusal to grant it, where all the proceedings appear of record, may be reviewed on error."

But it is clear upon reason and authority that where the case has gone to sentence and the want of jurisdiction does not appear upon the face of the proceedings, the granting of the writ, which even if of right is not of course, is not obligatory upon the court, and the party applying may be precluded by acquiescence from obtaining it.

Section fourteen of the act of May 17, 1884, provided: "That the provisions of chapter three, title twenty-three, of the Revised Statutes of the United States, relating to the unorganized Territory of Alaska, shall remain in full force, except as herein specially otherwise provided." Chapter 3 of Title XXIII of the Revised Statutes is entitled: "Provisions relating to the unorganized Territory of Alaska," and begins with section 1954, which is as follows: "The laws of the United States relating to customs, commerce and navigation are extended to and over all the mainland, islands and waters

of the territory ceded to the United States by the Emperor of Russia by treaty concluded at Washington on the thirtieth day of March, anno Domini, eighteen hundred and sixty-seven, so far as the same may be applicable thereto."

By the treaty of March 30, 1867, (15 Stat. 539,) the Emperor of Russia ceded to the United States "all the territory and dominion now possessed by his said majesty on the continent of America and in the adjacent islands, the same being contained within the geographical limits herein set forth, to wit: The eastern limit is the line of demarcation between the Russian and the British possessions in North America, as established by the convention between Russia and Great Britain of February 28–16, 1825, described in articles III and IV of said convention, in the following terms: (Here follows the description of the eastern limit as given in the convention referred to.)

"The western limit within which the territories and dominion conveyed are contained, passes through a point in Behring's straits on the parallel of sixty-five degrees thirty minutes north latitude, at its intersection by the meridian which passes midway between the islands of Krusenstern or Ignalook, and the island of Ratmanoff, or Noonarbook, and proceeds due north, without limitation, into the same Frozen Ocean. The same western limit, beginning at the same initial point, proceeds thence in a course nearly southwest through Behring's straits and Behring's Sea, so as to pass midway between the northwest point of the island of St. Lawrence and the southeast point of Cape Choukotski, to the meridian of one hundred and seventy-two west longitude; thence, from the intersection of that meridian, in a southwesterly direction, so as to pass midway between the island of Attou and the Copper Island of the Kormandorski couplet or group in the North Pacific Ocean, to the meridian of one hundred and ninety-three degrees west longitude, so as to include in the territory conveyed the whole of the Aleutian Islands east of that meridian."

Section 1956, (Tit. XXIII, c. 3,) Revised Statutes, reads thus:

"No person shall kill any otter, mink, marten, sable or fur

seal, or other fur-bearing animal within the limits of Alaska Territory, or in the waters thereof; and every person guilty thereof shall, for each offence, be fined not less than two hundred nor more than one thousand dollars, or imprisoned not more than six months, or both; and all vessels, their tackle, apparel, furniture and cargo, found engaged in violation of this section shall be forfeited; but the Secretary of the Treasury shall have power to authorize the killing of any such mink, marten, sable or other fur-bearing animal, except fur seals, under such regulation as he may prescribe; and it shall be the duty of the Secretary to prevent the killing of any fur seal, and to provide for the execution of the provisions of this section until it is otherwise provided by law; nor shall he grant any special privileges under this section."

Section 3 of the act of March 2, 1889, (25 Stat. 1009, c. 415,) is as follows:

"That section nineteen hundred and fifty-six of the Revised Statutes of the United States is hereby declared to include and to apply to all the dominion of the United States in the waters of Behring Sea; and it shall be the duty of the President, at a timely season in each year, to issue his proclamation and cause the same to be published for one month in at least one newspaper if any such there be published at each United States port of entry on the Pacific coast, warning all persons against entering said waters for the purpose of violating the provisions of said section; and he shall also cause one or more vessels of the United States to diligently cruise said waters and arrest all persons, and seize all vessels found to be, or to have been, engaged in any violation of the laws of the United States therein."

Section 734, Revised Statutes, is as follows:

"Proceedings on seizures, for forfeiture under any law of the United States, made on the high seas, may be prosecuted in any district into which the property so seized is brought and proceedings instituted. Proceedings on such seizures made within any district shall be prosecuted in the district where the seizure is made, except in cases where it is otherwise provided."

Under section 563, the District Courts have exclusive jurisdiction over forfeitures and seizures on navigable waters, and on land and on waters not within admiralty and maritime jurisdiction. The District Court of Alaska had jurisdiction in admiralty, therefore, to forfeit vessels for violation of section 1956 on any of the navigable waters within the dominion of the United States, acquired by the treaty of March 30, 1867.

The contention on behalf of the petitioner is that it appears from the record that the schooner Sayward was forcibly arrested by the United States on the high seas fifty-nine miles from shore, and forcibly taken within the limits of the District of Alaska, and subjected to condemnation and forfeiture in the Alaska District Court for the violation of section 1956 of the Revised Statutes of the United States, by its master and seamen and seal hunters under him, in killing fur seal at the place of seizure; and that the court was absolutely destitute of jurisdiction, because by the recognized principles of international law the territorial waters of each nation and its municipal jurisdiction on the high seas are limited to three miles or a marine league from shore. And it is insisted that when Congress in section 1956 speaks of "Alaska Territory" and "the waters thereof," it could only mean, so far as the sea was concerned, three miles or a marine league from the shore of the continent, or from the shores of one of the adjacent islands, and that the act of March 2, 1889, does not in any way enlarge the effect of section 1956, because "the dominion of the United States in the waters of Behring Sea" is limited by the law of nations to the distance from the shore above mentioned.

If we assume that the record shows the locality of the alleged offence and seizure as stated, it also shows that officers of the United States, acting under the orders of their government, seized this vessel engaged in catching seal and took her into the nearest port; and that the law officers of the government libelled her and proceeded against her for the violation of the laws of the United States, in the District Court, resulting in her condemnation.

How did it happen that the officers received such orders? It must be admitted that they were given in the assertion on the part of this government of territorial jurisdiction over Behring Sea to an extent exceeding fifty-nine miles from the shores of Alaska; that this territorial jurisdiction, in the enforcement of the laws protecting seal fisheries, was asserted by actual seizures during the seasons of 1886, 1887 and 1889, of a number of British vessels; that the government persistently maintains that such jurisdiction belongs to it, based not only on the peculiar nature of the seal fisheries and the property of the government in them, but also upon the position that this jurisdiction was asserted by Russia for more than ninety years, and by that government transferred to the United States; and that negotiations are pending upon the subject.

While it is conceded that in matters committed by the Constitution and laws of the United States either to Congress or to the executive, or to both, courts are clearly bound by the action of Congress or the executive, or both, within the limits of the authority conferred by the Constitution and laws, yet it is insisted that Congress and the executive, constituting the political departments of the government, having before them the question "of the extent of the dominion of the United States in the Behring Sea," which they could doubtless by conjoint action determine so as to bind the courts, have chosen neither to determine that extent nor to make any provision of law by which it is devolved on the executive to determine it, and that, therefore, it is the duty of this court in the case at bar, involving the legality of the seizure and condemnation of a foreign vessel alleged to be in violation of the law of nations and without warrant of any law of the United States to determine the question.

Assuming that the executive alone can speak so as to bind our courts in respect of the sovereignty of foreign territory, the changes in foreign governments, the existence of civil war in foreign countries, and the character of a foreign minister, counsel nevertheless confidently assert "that without the clear authority of the law of Congress, the executive can never, by determining a so-called political question or by construing an

act of Congress or a treaty, conclude the rights of persons or property under the protection of the Constitution and laws of the United States, or conclude the courts of the United States in a determination of these rights;" and *Little* v. *Barreme*, 2 Cranch, 170, 177, and *United States* v. *Rauscher*, 119 U. S. 407, 418, are cited.

In *Little* v. *Barreme*, the legality of the seizure of a French vessel, coming from a French port, on the high seas, by the orders of the President, purporting to be issued under an act of Congress authorizing the seizure of vessels bound to a French port, but not those coming from a French port, was involved, and Mr. Chief Justice Marshall, delivering the opinion of the court, said:

"It is by no means clear that the President of the United States, whose high duty it is to 'take care that the laws be faithfully executed,' and who is commander-in-chief of the armies and navies of the United States, might not, without any special authority for that purpose, in the then existing state of things, have empowered the officers commanding the armed vessels of the United States, to seize and send into port for adjudication *American* vessels which were forfeited by being engaged in this illicit commerce. But when it is observed that the general clause of this first section of the act, which declares 'that such vessels may be seized, and may be prosecuted in any District or Circuit Court, which shall be holden within or for the district where the seizure shall be made,' obviously contemplates a seizure within the United States; and that the fifth section gives a special authority to seize on the high seas, and limits that authority to the seizure of vessels bound or sailing *to* a French port, the legislature seem to have prescribed that the manner in which this law shall be carried into execution, was to exclude a seizure of any vessel not bound *to* a French port. Of consequence, however strong the circumstances might be, which induced Captain Little to suspect the Flying-Fish to be an American vessel, they could not excuse the detention of her, since he would not have been authorized to detain her had she been really American."

And he states the conclusion of the court to be: "That the instructions cannot change the nature of the transaction, nor legalize an act which, without those instructions, would have been a plain trespass."

In *United States* v. *Rauscher*, it appeared that the United States asserted the right under the law of nations to try persons extradited from Great Britain for offences other than those for which they were extradited, while Great Britain insisted that no such right existed under the law of nations or was conceded by treaty. The question was, whether, under the treaty with Great Britain, a man extradited from England to this country on the charge of murder could be tried here for another offence, and it was held that he could not be. And Mr. Justice Miller, delivering the opinion of the court quoted from the *Head Money Cases*, 112 U. S. 580, 598, the following language as determinative of the principle upon which the court proceeded: "A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress. But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. An illustration of this character is found in treaties which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens. The Constitution of the United States places such provisions as these in the same category as other laws of Congress, by its declaration that 'this Constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the

supreme law of the land.' A treaty, then, is a law of the land, as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute."

As to the third section of the act of March 2, 1889, it is argued that Congress intentionally declined to determine the extent of the dominion of the United States in the Behring Sea, as shown by its action during the steps attending the passage of the bill. That section, as the bill passed the House, contained the words: "All the waters of Behring Sea in Alaska embraced within the boundary lines mentioned and described in the treaty with Russia, dated March 30, A.D. 1867, by which the Territory of Alaska was ceded to the United States." But as finally enacted these words were omitted, and the expression "All the dominion of the United States in the waters of Behring Sea" substituted. Section two of the bill as originally introduced in the Senate contained the words in question, but they were omitted in a substitute adopted by the Senate, and added by the House, by way of amendment, as section three. To this amendment the Senate disagreed, and the section, as it now stands, was the result of a conference between the two houses. If reference could be properly made to such matters, (for the act, as finally approved, must speak for itself,) still we do not concur in the view that it follows that Congress thereby expressly invited the judicial branch of the government to determine what are "the limits of Alaska Territory and the waters thereof," and what is "the dominion of the United States in the waters of Behring Sea," and think, on the contrary, that there is much force in the position that, whatever the reason for the conservative course pursued by the Senate, the enactment of this section, with full knowledge of the executive action already had and of the diplomatic situation, justified the President in the conclusion that it was his duty, under section three, to adhere to the construction already insisted upon as to the extent of the dominion of the United States, and to continue to act accordingly.

If this be so, the application calls upon the court, while negotiations are pending, to decide whether the government is right or wrong, and to review the action of the political departments upon the question, contrary to the settled law in that regard. *Foster* v. *Neilson*, 2 Pet. 253; *Williams* v. *Suffolk Ins. Company*, 3 Sumner, 270; *S. C.* on certificate of division, 13 Pet. 415; *Luther* v. *Borden*, 7 How. 1; *Georgia* v. *Stanton*, 6 Wall. 50; *Jones* v. *United States*, 137 U. S. 202; *Nabob of Carnatic* v. *East India Company*, 1 Ves. Jr. 371; *S. C.* 2 Ves. Jr. 56; *Barclay* v. *Russell*, 3 Ves. Jr. 424; *Penn* v. *Baltimore*, 1 Ves. Sr. 444.

In this case, Her Britannic Majesty's Attorney General of Canada has presented, with the knowledge and approval of the Imperial government of Great Britain, a suggestion on behalf of the claimant. He represents no property interest in the vessel, as is sometimes done by consuls, but only a public political interest. We are not insensible to the courtesy implied in the willingness thus manifested that this court should proceed to a decision on the main question argued for the petitioner; nor do we permit ourselves to doubt that under such circumstances the decision would receive all the consideration that the utmost good faith would require; but it is very clear that, presented as a political question merely, it would not fall within our province to determine it. We allude to this in passing, but not at all with the intention of indicating that the suggestion itself diminishes the private rights of the claimant in any degree.

We are not to be understood, however, as underrating the weight of the argument that in a case involving private rights, the court may be obliged, if those rights are dependent upon the construction of acts of Congress or of a treaty, and the case turns upon a question, public in its nature, which has not been determined by the political departments in the form of a law specifically settling it, or authorizing the executive to do so, to render judgment, "since we have no more right to decline the jurisdiction which is given than to usurp that which is not given."

But we need not go farther in this direction, as our decision

rests upon narrower grounds, and we have been led into these observations because, where an application is made to stay the enforcement of a decree three years after its rendition, and after the pendency of an appeal therefrom for the same length of time, (an appeal being allowable, as we shall presently see,) we do not regard the court as constrained to intervene in this way unless, perhaps, upon an irresistible case and adequate reason shown for the delay; and particularly not where such intervention involves the definition of the line of demarcation between coördinate departments of the government and the determination of public questions, action in reference to which is appropriately confided to other departments than the judicial.

In what has been said, we have assumed that it appears from the record, properly examinable by us, that the alleged offence was committed more than a marine league from shore; and we now come to consider whether this is the fact. And in doing this, with the view of ascertaining whether the claimant is entitled to be relieved of the payment of $7289.50, which is the amount of the stipulation, the record must be treated as in any other case of private rights.

As already seen, prohibition will not go after sentence unless want of jurisdiction appears on the face of the proceedings. But it is contended that the face of the proceedings in a case like the present one embraces the evidence. We think, however, that there is a distinction on principle, and sustained by authority, between what is open on prohibition applied for before sentence and what afterwards. Prohibition stays what is about to be done, but which ought not to be done without it. Before judgment, if the court below persist in going on when it should not, the court above can examine, not simply the process and pleadings technically of record, but the facts in evidence upon which action is being taken.

In *Ex parte Christy*, 3 How. 292, 308, which was an application for a writ of prohibition against the District Court of Louisiana sitting as a court in bankruptcy, Mr. Justice Story said: "So far as respects these allegations of facts, not so found in the proceedings of the District Court, we are not

upon the present occasion at liberty to entertain any consideration thereof for the purpose of examination or decision, as it would be an exercise of original jurisdiction on the part of this court not confided to us by law. The application for the prohibition is made upon the ground that the District Court has transcended its jurisdiction in entertaining those proceedings; and whether it has or not must depend, not upon the facts stated *dehors* the record, but upon those stated in the record upon which the District Court was called to act, and by which alone it could regulate its judgment." And this language was repeated and approved in *Ex parte Easton*, 95 U. S. 68, where prohibition was asked against a District Court in admiralty. These were cases where the application was before sentence, and they show that the court may consider the evidence as well as the other proceedings in the court sought to be restrained. But after final judgment and the lapse of the term, for the Superior Court to enter upon an examination of the evidence upon a suggested defect in the jurisdiction, that is, a defect not apparent upon the face of the record proper, would be for it to rehear the case and direct the court below not to carry its own judgment into effect, for defect of power to try the particular issue rather than of jurisdiction over the cause. What the court below could not then do, or omit to do, the court above ought not ordinarily to undertake to compel it to do or to omit.

In *United States* v. *Peters*, 3 Dall. 121, the Cassius, the vessel seized, was under commission by the French government, and was libelled in the District Court of Pennsylvania on account of the seizure of a schooner belonging to libellants upon the high seas, and the libel showed that the schooner had been taken into Port de Paix, (in the dominions of the French Republic,) which justified the presumption that she was carried there for legal adjudication, and it appeared from the suggestion for the prohibition that such was the fact, and that therefore the jurisdiction for the adjudication of the libel was in a French and not in an American admiralty court. That was an application before sentence and the court could look into the evidence before the District Court if necessary,

though it appears to us that the want of jurisdiction was evident on the face of the libel; and prohibition was accordingly issued.

In *Ex parte Phœnix Insurance Co.*, 118 U. S. 610, 626, it was held that the District Court of the United States in admiralty has no jurisdiction of a petition by the owner of a steam vessel for the trial of the question of his liability for damages caused to buildings on land by fire alleged to have been negligently communicated to them by the vessel through sparks proceeding from her smokestack, and for the limitation of such liability, if existing, under §§ 4283 and 4284, Revised Statutes. And Mr. Justice Blatchford, delivering the opinion of the court, said, after citing *Ex parte Easton*, 95 U. S. 68, and *Ex parte Gordon*, 104 U. S. 515: "But in the present case the District Court is called upon by the petition of the owner of the vessel to first determine the question of any liability, when it has no jurisdiction of the cause of action, and then to determine whether the statute covers the case. The case is clearly one for a writ of prohibition, as the want of jurisdiction appears on the face of the proceedings. *United States* v. *Peters*, 3 Dall. 121."

The cases cited in the text-books, High on Extr. Rem., 606; Shortt on Informations, 442, 448, sustain the general view that the evidence is not to be resorted to after sentence. The principle has no application to courts where the proceedings do not show the matter in any formal way, and such are the decisions in England in reference to county and mayor's courts.

United States District Courts sitting in admiralty are courts of superior jurisdiction and every intendment is made in favor of their decrees, so that where it appears that the court has jurisdiction of the subject matter, and that the defendant was duly served with process or voluntarily appeared and made defence, the decree is not open to attack collaterally. *Miller* v. *United States*, 11 Wall. 268; *McCormick* v. *Sullivant*, 10 Wheat. 192; *Des Moines Nav. Company* v. *Homestead Company*, 123 U. S. 552; *Cuddy, Petitioner*, 131 U. S. 280.

By section 750, Revised Statutes, it is provided: "In equity

and admiralty causes only the process, pleadings and decree, and such orders and memorandums as may be necessary to show the jurisdiction of the court and regularity of the proceedings, shall be entered upon the final record."

Section 698 is as follows:

"Upon the appeal of any cause in equity, or of admiralty and maritime jurisdiction, or of prize or no prize, a transcript of the record, as directed by law to be made, and copies of the proofs, and of such entries and papers on file as may be necessary on the hearing of the appeal, shall be transmitted to the Supreme Court; *Provided*, That either the court below or the Supreme Court may order any original document or other evidence to be sent up, in addition to the copy of the record, or in lieu of a copy of a part thereof."

In this section the distinction is recognized between that which constitutes the final record and that which may be made part of the record for the purposes of appeal. On appeal all questions properly preserved are open to determination, while on prohibition the inquiry is confined to the matter of jurisdiction, so that it seems to follow that, unless under very extraordinary circumstances, the record proper should only be looked into in the latter class of cases.

If the record thus made constitutes the face of the proceedings here, the alleged want of jurisdiction does not appear therefrom.

The libel alleges that the seizure was made "within the limits of Alaska Territory and in the waters thereof, and within the civil and judicial District of Alaska, to wit, within the waters of that portion of Behring Sea belonging to the United States and said district, on waters navigable from the sea by vessels of ten or more tons burden." As it is admitted that the United States lawfully exercises jurisdiction to the extent of three miles from shore over the waters of Behring Sea, the allegation of seizure within the jurisdiction is sufficient. The libel further avers that the vessel and her captain, officers and crew, "were then and there found engaged in killing fur seals within the limits of Alaska Territory, and in the said waters thereof, in violation of section 1956 of the

Revised Statutes of the United States." Of course, these are the waters over which the United States lawfully exercises jurisdiction, and upon the face of the libel the court had jurisdiction of the forfeiture and of the offence. The master raised no question of jurisdiction in filing his claim, and the demurrer having been overruled, the answer denied that the seizure was made within the waters described or that the vessel, captain, officers or crew were found engaged in killing fur seal within the limits of Alaska Territory or in the waters thereof, or that they were then and there violating any law of the United States. Trial having been had the court found that "on the 9th day of July, 1887, and theretofore, the master and crew of the defendant vessel were engaged in killing and did kill fur seals in that portion of Behring Sea ceded by Russia to the United States by the treaty of March, 1867, and within the waters of Alaska, in violation of section 1956 of the Revised Statutes of the United States." This was a finding of the commission of the offence within the jurisdiction stated in the libel.

As already seen, the first section of the act of May 17, 1884, provided, "that the territory ceded to the United States by Russia by the treaty of March thirtieth, eighteen hundred and sixty-seven, and known as Alaska," should constitute a civil and judicial district. And by section 1954 of the Revised Statutes, the laws of the United States relating to customs, commerce and navigation were extended "to and over all the main-land, islands and waters of the territory ceded to the United States by the Emperor of Russia by treaty concluded at Washington on the thirtieth day of March, anno Domini eighteen hundred and sixty-seven." The finding refers similarly to that portion of Behring Sea ceded by Russia, and states that the killing was "within the waters of Alaska." The second and third findings were that the vessel, her furniture, apparel, tackle, cargo and 477 fur-seal skins, were seized in said waters, that is to say, in the waters of Alaska, by the commanding officer of the United States revenue-cutter Rush, then and there engaged in the revenue marine service of the United States, who was duly commis-

sioned by the President of the United States, and made such seizure under the direction and by the authority of the Treasury Department.

Upon the face of the libel and findings, if the jurisdiction did not extend beyond three miles from the shore, the legal inference is that the offence and seizure were within that limit. *Hudson* v. *Guestier*, 6 Cranch, 281; *The Rio Grande*, 23 Wall. 458. The court had power to inquire into the fact upon which jurisdiction depended and its maintenance of jurisdiction involved the conclusion necessary to sustain it.

If, therefore, the findings of fact are properly part of the face of the proceedings, the want of jurisdiction not only does not appear, but the contrary. The petitioner asked no finding of fact by the court as to the exact locality, but after the findings and conclusion were made and filed, moved in arrest, assigning, among other grounds, "that from the evidence produced on the part of the United States it appears that this court has no jurisdiction over the subject matter of this cause." But this motion was not equivalent to a plea in abatement, nor to a declinatory allegation in the nature of a plea to the jurisdiction, nor to a motion for a rehearing. By the demurrer and answer the defendant had submitted to the jurisdiction, and whatever might be his rights upon appeal, the interposition of this motion did not make that a part of the face of the proceedings, which would not have been so without it.

Passing from this, however, what is the attitude of the case as to the findings? Is this court bound by them or not? If so, no reference to the evidence would be admissible.

The latter part of section 7 of the act of May 17, 1884, 23 Stat. 24, 26, is as follows: "Writs of error in criminal cases shall issue to the said District Court from the United States Circuit Court for the District of Oregon in the cases provided in chapter one hundred and seventy-six of the laws of eighteen hundred and seventy-nine; and the jurisdiction thereby conferred upon Circuit Courts is hereby given to the Circuit Court of Oregon. And the final judgments or decrees of said Circuit and District Court may be reviewed by the Supreme Court of the United States as in other cases." We

are of opinion that the word Circuit as here used refers to the Circuit Court of Oregon, and, for the purposes of the matter in hand, the clause may be read: "And the final judgments or decrees of said District Court of Alaska may be reviewed by the Supreme Court of the United States as in other cases."

Under sections 690, 691, 692, 695 and 699, of the Revised Statutes, this court has appellate jurisdiction to reëxamine the final judgments of any Circuit Court, or of any District Court acting as a Circuit Court, in civil actions, where the matter in dispute, exclusive of costs, exceeds the sum or value of $5000; all final decrees of any Circuit Court, or of any District Court acting as a Circuit Court, in cases of equity and of admiralty and maritime jurisdiction, within the same limit of amount involved; all final decrees of any District Court in prize causes; all final judgments at law and final decrees in equity of any Circuit Court or of any District Court acting as a Circuit Court, in any case touching patent rights or copyrights; in any civil action brought by the United States for the enforcement of any revenue law thereof; in actions against revenue officers; in cases brought on account of deprivation of rights of citizens or of rights under the Constitution; and in suits for injuries by conspirators against civil rights. Under section 701 this court may affirm, modify or reverse any judgment, decree or order of a Circuit Court, or District Court acting as a Circuit Court, or of a District Court in prize causes, lawfully brought before it for review, or may direct such judgment, decree or order to be rendered, or such further proceedings to be had by the inferior court as the justice of the case may require. And it is argued that the words "as in other cases," in section 7 of the act of 1884 can mean nothing else than other cases of appeals from District Courts and District Courts acting as Circuit Courts; and that the right of appeal from the decrees of District Courts is confined to prize causes under section 695.

It is said that if there could be such a thing as an appeal from the District Court of Alaska in an ordinary admiralty case direct to this court, this court would be obliged to try the case *de novo;* that the District Court of Alaska, sitting as an

admiralty court, would supply and take the place of a Circuit Court in admiralty sitting in appeal, although all the statutes authorizing District Courts to exercise the functions of Circuit Courts expressly exclude the power of appeal; that the only foundation of a right of appeal from the Alaska court, based upon this right to exercise the jurisdiction of a Circuit Court, is section 692 of the Revised Statutes, and that only extends to the final decrees of such District Court when exercising the jurisdiction of a Circuit Court, while the exercise of admiralty and maritime jurisdiction by the District Court for Alaska was, by the act creating it and the Revised Statutes, the exercise of purely District Court jurisdiction as such; nor could the Alaska court be supposed to have acted in the exercise of both jurisdictions, as the only admiralty and maritime jurisdiction which belongs to the Circuit Courts is appellate.

But the District Court of Alaska is not alone a District Court of the United States, and a District Court exercising Circuit Court powers; it is also a court of general law and equity jurisdiction. If the contention of petitioner were correct, any power of review in this court over judgments and decrees of the Alaska court in law and equity, except when entered as a Circuit Court, would be excluded. We do not think it was the intention of Congress to give such finality to its judgments and decrees.

It seems to us that the words "as in other cases" mean, as in similar cases from other courts; and we concur in the construction contended for on the part of the respondent, that the meaning of the provision is, that this court may review the final judgments or decrees of the District Court of Alaska as in cases of the same kind from other courts.

The act of February 16, 1875, (18 Stat. 315,) provides that Circuit Courts of the United States in deciding causes of admiralty or maritime jurisdiction on the instance side of the court, shall find the facts and the conclusions of law upon which it renders its judgments or decrees, and shall state the facts and conclusions of law separately. And the review of the judgments or decrees entered upon such findings, by this court, upon appeal, is "limited to a determination of the ques-

tions of law arising upon the record, and to such rulings of the Circuit Court, excepted to at the time, as may be presented by a bill of exceptions prepared as in actions at law."

In *Durousseau* v. *United States*, 6 Cranch, 307, 315, the effect of section ten of the Judiciary Act of 1789, (1 Stat. 73, 77,) was under consideration. The section provided "that the District Court in Kentucky District" should, in addition to the ordinary jurisdiction of a District Court, "have jurisdiction of all other causes, except of appeals and writs of error hereinafter made cognizable in a Circuit Court, and shall proceed therein in the same manner as a Circuit Court, and writs of error and appeals shall lie from decisions therein to the Supreme Court in the same causes, as from a Circuit Court to the Supreme Court, and under the same regulations."

It was argued that under this provision the writs of error and appeals provided were intended to lie only from cases in which the District Court acted as a Circuit Court. Mr. Chief Justice Marshall, delivering the opinion of the court, said:

"It would be difficult to conceive an intention in the legislature to discriminate between judgments rendered by the District Court of Kentucky, while exercising the powers of a District Court, and those rendered by the same court, while exercising circuit powers, when it is demonstrated that the legislature makes no distinction in the cases from their nature and character. Causes of which the District Courts have exclusive original jurisdiction are carried into the Circuit Courts, and then become the objects of the appellate jurisdiction of this court. It would be strange if, in a case where the powers of the two courts are united in one court, from whose judgments an appeal lies, causes, of which the District Courts have exclusive original jurisdiction, should be excepted from the operation of the appellate power. It would require plain words to establish this construction.

"The plain meaning of these words is, that wherever the District Court decides a cause which, if decided in a Circuit Court, either in an original suit. or on an appeal, would be subject to a writ of error from the Supreme Court, the judg-

ment of the District Court shall, in like manner, be subject to a writ of error."

In our view, that decision is in point and is decisive. We hold that an appeal lay to this court from the decree in question, and, further, that the act of 1875 applies, and that, the District Court having found the facts, we should be limited, on appeal, in the consideration of the case, to the questions of law presented on the record.

Upon the face of the libel, the facts found and the final decree, the District Court clearly had jurisdiction. This petitioner had a remedy by appeal from that decree, which was inefficacious because of his neglect to have included in those findings the fact of the exact locality of the offence and seizure. Such being the case, the writ of prohibition prayed for should not issue, even if, under any circumstances, the court could consider the evidence taken below in determining whether a prohibition should issue after sentence.

Rule discharged and prohibition denied.

Mr. Justice Field dissented.

THE SYLVIA HANDY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.

No. 58. Argued November 11, 1891. — Decided February 29, 1892.

As the bill of exceptions does not purport to contain all the evidence, and as no request was made for a finding of fact as to the actual fact of the killing of the seals and the seizure of the vessel, the rulings in *Ex parte Cooper*, *ante*, 472, are decisive of this case, and it is followed.

The court stated the case as follows:

This was a libel filed in the District Court of the United States in and for the District of Alaska, September 15, 1887,

alleging the seizure by the commander of the revenue-cutter Bear, duly thereto authorized, of the schooner Sylvia Handy of San Francisco, her tackle, etc., on September 2, 1887, "within the limits of Alaska Territory, and in the waters thereof, and within the civil and judicial district of Alaska, to wit, within the waters of that portion of Behring Sea belonging to the United States and said district, on waters navigable from the sea by vessels of ten or more tons' burden," as forfeited to the United States for the killing of fur seal "within the limits of Alaska Territory and in the said waters thereof in violation of section 1956 of the Revised Statutes of the United States."

Monition was duly issued and returned, and the owners intervened and made claim to the schooner, her tackle, etc., September 19, 1887, and on the same day filed a general demurrer, which was overruled, and then an answer traversing the averments of the libel in general terms.

The right to publication and posting of notice of the libel and seizure of the property proceeded against was waived, as also the time of hearing. The cause having been heard, the following findings and conclusions of law were made and filed September 22, 1887:

"This cause having been tried and submitted, the court, from the evidence, finds the following facts and conclusions of law:

"1st. That on the 2d day of September, 1887, and theretofore, the master and crew of the defendant's vessel were engaged in killing and did kill fur seals in that portion of Behring Sea ceded by Russia to the United States by the treaty of March, 1867, and within the waters of Alaska, in violation of section 1956 of the Revised Statutes of the United States, and that the promiscuous shooting of fur-bearing animals in the waters adjacent to the islands of St. Paul and St. George, and in that portion of Behring Sea east of the 193d degree of west longitude, has a tendency to frighten and prevent said animals from going upon those islands, as they have been accustomed to do in the past.

"2d. That on the said 2d day of September, 1887, said

vessel, her furniture, apparel, tackle, cargo and 1679 fur-seal skins were seized in said waters by the commanding officer of the United States revenue-cutter Bear, then and there engaged in the revenue marine service of the United States.

"3d. That said commanding officer was duly commissioned by the President of the United States, and made such seizure under the direction and by the authority of the Treasury Department of the United States.

"4th. That said property so seized was delivered by said commanding officer of said cutter to the United States marshal of the district of Alaska, and is now within the jurisdiction of this court.

"As conclusions of law the court finds that the plaintiff is entitled to a decree of forfeiture against said vessel, her tackle, apparel, furniture, cargo, and the said 1679 fur-seal skins."

A motion in arrest was filed October 3, 1887, and a motion for new trial and stay of proceedings, February 14, 1888, which was overruled by the court, February 21. An appeal to this court was allowed and perfected March 23, 1888.

Mr. Calderon Carlisle for appellant. *Mr. William G. Johnson* and *Mr. Howell A. Powell* filed briefs for same.

Mr. Attorney General and *Mr. Solicitor General* for the United States.

Mr. Chief Justice Fuller delivered the opinion of the court.

We have already held in *Ex parte Cooper*, *ante*, 472, that the act of February 16, 1875, (c. 77, sec. 1, 18 Stat. 315,) applies to appeals taken from decrees of the District Court of the United States for the District of Alaska sitting in admiralty, and we are therefore limited upon this appeal to a determination of the questions of law arising upon the record, and to such rulings of the court, excepted to at the time, as may be presented by a bill of exceptions prepared as in actions at law. The libel and findings in this case, as in that, are sufficient to sustain the jurisdiction.

The certificate of the clerk is to the effect "that the foregoing copies of pleadings, papers and journal entries in the cause of *The United States* v. *The Schooner Sylvia Handy and L. N. Handy & Co.* have been by me compared with the originals thereof as the same appear on file and of record in this court, and that the same are full and true transcripts of said original pleadings, papers and journal entries now in my custody and control." No mention is made in this certificate of a bill of exceptions, but we find in the record a paper so styled filed March 23, 1888, and presumably signed on that day. Two terms of the District Court of Alaska are provided for in each year, one beginning on the first Monday of May and the other on the first Monday of November. (23 Stat. 24, c. 53, sec. 3.) The trial of this cause took place on the 22d of September, 1887, and the decree was entered on that day, and there is nothing in the record showing the authority of the court to allow a bill of exceptions at the succeeding term. Looking into the bill, however, the only exception that we find there taken, is thus stated: "The defendants there and then excepted to the ruling of the court and the law as declared by the court, viz.:" and then follow the findings of fact and conclusions of law made and filed by the court.

The bill of exceptions does not purport to contain all the evidence, and no request was made for a finding of fact as to the actual locality of the killing and the seizure in question.

Under these circumstances, the rulings in *Ex parte Cooper* are decisive of this case, and the decree will therefore be

Affirmed.

MR. JUSTICE FIELD dissented.

BUDD v. NEW YORK.

ERROR TO THE SUPERIOR COURT OF BUFFALO, STATE OF NEW YORK.

NEW YORK *ex rel.* ANNAN v. WALSH.

NEW YORK *ex rel.* PINTO v. WALSH.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

Nos. 719, 644, 645. Argued November 17, 18, 1891. — Decided February 29, 1892.

An act of the legislature of New York (Laws of 1888, chap. 581) provided that the maximum charge for elevating, receiving, weighing and discharging grain should not exceed five-eighths of one cent a bushel; and that, in the process of handling grain by means of floating and stationary elevators, the lake vessels or propellers, the ocean vessels or steamships, and canal boats, should only be required to pay the actual cost of trimming or shovelling to the leg of the elevator when unloading, and trimming cargo when loading; *Held*, that the act was a legitimate exercise of the police power of the State over a business affected with a public interest, and did not violate the Constitution of the United States, and was valid.

The case of *Munn* v. *Illinois*, 94 U. S. 113, reviewed and adhered to, and its application in cases decided in the state courts considered.

The decision in *Chicago &c. Railway Co.* v. *Minnesota*, 134 U. S. 418 explained.

Although the act of New York did not apply to places having less than 130,000 population, it did not deprive persons owning elevators in places of 130,000 population or more, of the equal protection of the laws.

THE case, as stated by the court, was as follows:

On the 9th of June, 1888, the governor of the State of New York approved an act, chapter 581 of the laws of New York of 1888, which had been passed by the two houses of the legislature, three-fifths being present, entitled "An act to regulate the fees and charges for elevating, trimming, receiving, weighing and discharging grain by means of floating and stationary elevators and warehouses in this State." The act was in these words: "Section 1. The maximum charge for elevating, receiving, weighing and discharging grain by means of floating and

stationary elevators and warehouses in this State shall not exceed the following rates, namely: For elevating, receiving, weighing and discharging grain, five-eighths of one cent a bushel. In the process of handling grain by means of floating and stationary elevators, the lake vessels or propellers, the ocean vessels or steamships, and canal boats, shall only be required to pay the actual cost of trimming or shovelling to the leg of the elevator when unloading, and trimming cargo when loading. § 2. Any person or persons violating the provisions of this act, shall, upon conviction thereof, be adjudged guilty of a misdemeanor, and be punished by a fine of not less than two hundred and fifty dollars and costs thereof. § 3. Any person injured by the violation of the provisions of this act, may sue for and recover any damages he may sustain against any person or persons violating said provisions. § 4. This act shall not apply to any village, town, or city having less than one hundred and thirty thousand population. § 5. This act shall take effect immediately."

On the 26th of November, 1888, an indictment which had been found by the grand jury of Erie County, New York, in the court of sessions of that county, against J. Talman Budd, for charging and receiving fees for elevating, receiving, weighing and discharging grain into and from a stationary elevator and warehouse, contrary to the provisions of said statute, came on for trial, before a criminal term of the Superior Court of Buffalo, Erie County.

The charge in the indictment was, that Budd, at Buffalo, on the 19th of September, 1888, being manager of the Wells elevator, which was an elevator and warehouse for receiving and discharging grain in the city of Buffalo, that city being a municipal corporation duly organized in pursuance of the laws of the State of New York and having a population of upwards of 130,000 people, did receive, elevate and weigh from the propeller called the Oceanica, the property of the Lehigh Valley Transportation Company, a body corporate, 51,000 bushels of grain and corn, the property of said company, into the said Wells elevator, and unlawfully exacted from said company, for elevating, receiving, weighing and

discharging said grain and corn, the sum of one cent a bushel, and also exacted from said company, for shovelling to the leg of the elevator, in the unloading of said 51,000 bushels of grain and corn, $1.75 for every 1000 bushels thereof, over and above the actual cost of such shovelling.

The facts set forth in the indictment were proved, and the defendant's counsel requested the court to instruct the jury to render a verdict of acquittal, on the ground that the prosecution was founded on a statute which was in conflict both with the Constitution of the United States and with that of the State of New York; that the services rendered by Budd, for which the statute assumed to fix a price, were not public in their nature; that neither the persons rendering them, nor the elevator in question, had received any privilege from the legislature, and that such elevator was not a public warehouse and received no license. The court declined to direct a verdict of acquittal, and the defendant excepted.

The court charged the jury that it was claimed by the prosecution that the defendant had violated the statute in charging more than five-eights of one cent a bushel for elevating, receiving, weighing and discharging the grain, and in charging more than the actual cost of trimming or shovelling to the leg of the elevator, in unloading the propeller; that the statute was constitutional; and that the jury should find the defendant guilty as charged in the indictment, if they believed the facts which had been adduced. The defendant excepted to that part of the charge which instructed the jury that they might find the defendant guilty of exacting an excessive rate for shovelling to the leg of the elevator, and also to that part which instructed the jury that they might convict the defendant for having exacted an excessive rate for elevating, receiving, weighing and discharging the grain and corn.

The jury brought in a verdict of guilty as charged in the indictment, and the court sentenced the defendant to pay a fine of $250, and, in default thereof, to stand committed to the common jail of Erie County for a period not exceeding one day for each dollar of said fine. The defendant appealed

from that judgment to the general term of the Superior Court of Buffalo, which affirmed the judgment. He then appealed to the Court of Appeals of New York, which affirmed the judgment of the Superior Court of Buffalo; and the latter court afterwards entered a judgment making the judgment of the Court of Appeals its judgment. The defendant then sued out from this court a writ of error directed to the Superior Court of Buffalo.

The opinion of the Court of Appeals is reported in 117 N. Y. 1. It was delivered by Judge Andrews, with whom Chief Judge Ruger and Judges Earl, Danforth and Finch concurred. Judges Peckham and Gray dissented, Judge Gray giving a dissenting opinion, and Judge Peckham adhering to the dissenting opinion which he gave in the case of *People* v. *Walsh*, 117 N. Y. 34.

On the 22d of June, 1888, a complaint on oath was made before Andrew Walsh, a police justice of the city of Brooklyn, New York, that on the preceding day one Edward Annan, a resident of that city, had violated the provisions of chapter 581 of the laws of New York of 1888, by exacting from the complainant more than five-eighths of one cent per bushel for elevating, weighing, receiving and discharging a boatload of grain from a canal-boat to an ocean steamer, and by exacting from the canal-boat and its owner more than the actual cost of trimming or shovelling to the leg of the elevator, and by charging against the ocean steamer more than the actual cost of trimming the cargo, the services being rendered by a floating elevator of which Annan was part owner and one of the agents. On this complaint, Annan was arrested and brought before the police justice, who took testimony in the case and committed Annan to the custody of the sheriff of the county of Kings, to answer the charge before a court of special sessions in the city of Brooklyn. Thereupon writs of *habeas corpus* and *certiorari* were granted by the Supreme Court of the State of New York, on the application of Annan, returnable before the general term of that court in the first instance; but on a hearing thereon, the writs were dismissed and Annan was remanded to the custody of the sheriff. The opinion of

the general term is reported in 50 Hun, 413. Annan appealed to the Court of Appeals, which affirmed the order of the general term, 117 N. Y. 621, for the reasons set forth in the opinion in the case of Budd, 117 N. Y. 1, and the judgment of the Court of Appeals was afterwards made the judgment of the Supreme Court. Annan sued out a writ of error from this court, directed to the Supreme Court of the State of New York.

Like proceedings to the foregoing were had in the case of one Francis E. Pinto, the charge against him being that he had exacted from the complainant more than five-eighths of one cent per bushel for receiving and weighing a cargo of grain from a boat into the Pinto stores, of which he was lessee and manager, the same being a stationary grain elevator on land in the city of Brooklyn, New York, and had exacted more than the actual cost of trimming or shovelling to the leg of the elevator. Pinto sued out from this court a writ of error to the Supreme Court of the State of New York.

Mr. Benjamin F. Tracy and *Mr. William N. Dykman* for Annan and Pinto, plaintiffs in error.

I. Floating elevators in the port of New York are private. They are not affected with any public interest, and they are not subject to regulation of rates. They are comparable to threshing machines which are moved about the country from one farm to another by horse power. In both machines there is the element of property, but in each case labor predominates.

We are helped in our study of Mr. Annan's status by decisions of the New York Court of Appeals fixing the status of his fellow-laborers in the grain trade.

In *Fish* v. *Clark*, 49 N. Y. 122 a canal-boat owner was held not to be a common carrier. The case arose over a cargo lost by the sinking of the boat, and plaintiffs asserted that the defendant canal-boat owner was liable absolutely and without proof of negligence, because, they said, he was a common carrier. The whole case turned on whether he was a public or a private carrier.

It is also settled in New York that the steamboat which

tows the canal-boat is not a common carrier. *Alexander* v. *Greene*, 3 Hill, 9; *Caton* v. *Rumney*, 13 Wend. 387; *Wells* v. *Steam Nav. Co.*, 2 N. Y. 204.

The stationary elevators along the Brooklyn shore are wholly private. *Wetmore* v. *Brooklyn Gas Light Co.*, 42 N. Y. 384; *Woodruff* v. *Havemeyer*, 106 N. Y. 129. Those were the cases of the wharves in front of the elevators, but the principle was distinctly enunciated that the riparian owners could exclude the public.

It is not conceivable that all who handle merchandise brought to New York by rail shall be held to be *quasi* public, and subject to have prices limited for their services, because the merchandise has been carried over a way built by permission and under a charter granted by the State. The fact that the one is a way on land, maintained by a grantee or appointee of the sovereign, and the other a waterway, maintained by the sovereign, does not alter the principle under discussion. But even if the law were or can be limited to grain carried through the canal, it is certain that the canal does not impress with a public character those who are engaged in carrying merchandise through it. *Fish* v. *Clark*, 49 N. Y. 122; *Wells* v. *Steam Nav. Co.*, 2 N. Y. 204; *Alexander* v. *Greene*, 3 Hill, 9.

II. This law cannot be defended upon the ground that the legislature may determine in an act what rates are equal and reasonable.

Upon the face of this act appears its true nature, intent and aim. Experience had shown that grain was most easily and economically moved and handled where the bill of lading under which the canal carrier transports his cargo bound him to deliver his cargo out of his boat and to pay therefor, and where the owner delivered the cargo to the ocean carrier, who, in his turn, bore the expense of stowing the grain against the voyage. But the canal-boatmen, conceiving this to be unjust, secured in this act a provision that they shall only pay for shovelling the grain to the leg of the elevator, and for that only at the actual cost of labor; and it is enacted also that the ocean carrier shall only be required to pay the actual cost of the labor involved in stowing his cargo.

It results that the elevator owner must hire men, superintend their labor and be responsible for its results, and *all without compensation*, for he can charge only what he pays out for labor. The law, therefore, cannot be defended as a determination what rates are equal and reasonable. It is a law prescribing the terms of the several contracts involved in moving grain. It enacts who shall pay. It provides how much each shall contribute. It compels the grain owner to pay for all the work done for him and for a part of the work done for the canal and ocean carrier.

III. This law is unconstitutional even if it be conceded or determined that the "Ceres" is a common or public elevator, for that would at the very furthest do no more than lower the rights of an elevator owner to those of a railroad company or other common carrier. *Chicago, Milwaukee & St. Paul Railway* v. *Minnesota*, 134 U. S. 418. Since that decision we understand it to be the settled doctrine of this court, that a law exercising the function of the State to control the prices charged by railroad common carriers and others subject to the like regulation, in order that their charges may be reasonable, must provide judicial forms and judicial machinery for the determination of the question or at least must leave the question open for an examination in the courts, and that an attempt to regulate rates without providing judicial machinery and depriving the constituted courts of jurisdiction is unconstitutional and void.

It follows that unless the law of New York permits a judicial investigation into the reasonableness of the rates fixed it also is in violation of the Constitution of the United States.

Whether a statute is constitutional or not is always a question of power — that is, a question whether the legislature in the particular case, in respect to the subject matter of the act, the manner in which its object is to be accomplished and the mode of enacting it has kept within the constitutional limits and observed the constitutional conditions. In any case in which this question is answered in the affirmative the courts are not at liberty to inquire into the proper exercise of the power. They must assume that legislative discretion has been

properly exercised. If evidence was required it must be supposed that it was before the legislature when the act was passed, and if any special finding was required to warrant the passage of the particular act it would seem that the passage of the act itself might be held equivalent to such finding. Cooley's Const. Lim. 222.

The "subject matter" raises the question whether floating elevators are within the legislative jurisdiction. "The manner in which its object is to be accomplished" means that a "subject matter" may be concededly within the legislative jurisdiction, and the law be void for a defect in methods of accomplishment. This court, in *The Chicago, Milwaukee & St. Paul Case*, held the Minnesota law unconstitutional and void for just such a defect, viz.: an attempt to exclude the courts from jurisdiction over the question of reasonableness of rates, and this defect of method is, we contend, equally fatal to the New York law.

IV. As to the judgment of this court in *Munn* v. *Illinois*, 94 U. S. 113, we submit, with very great respect that the mediæval rules and instances were allowed too great influence in that judgment. When England was mainly a pastoral and agricultural country, with her trade and commerce in their infancy, all sorts of burdensome restrictions were imposed upon the individual by a paternal theory of government for the supposed benefit of trade. But even at these times and in the midst of this mediæval darkness, the course of the judges was towards freedom. In the latter part of the eighteenth century there was a general awakening to the false theories which had permitted these impositions. In England Adam Smith's great work was followed by many repeals of vicious regulations, and by an entire cessation of new restraints. In France the edict of Louis XVI liberated trade from corresponding restrictions. In America the Declaration of Independence set forth the inalienable right of all men to life, liberty and the pursuit of happiness; that is, among other things to the right to enjoy and acquire property. That the essence of the right of property is in its use and in the power of alienation for use by others is obvious. Without

these the right is illusionary and valueless. Chief Justice Marshall long since taught us that to tax the sale of property is to tax the property itself. *Brown* v. *Maryland*, 12 Wheat. 419. The same proposition was repeated in *Welton* v. *Missouri*, 91 U. S. 275, Mr. Justice Field delivering the opinion of the unanimous court. See also *Wynehamer* v. *People*, 13 N. Y. 378; *In the matter of Jacobs*, 98 N. Y. 98, 106.

Our whole commercial history shows that our Constitution fixes a great and wide gulf between the old and the new; between mediæval darkness, which permitted every detail of one's life to be regulated, and modern freedom of action. We do not think that the judgment in the *Munn Case* estimated truly the condemnation of the old system, its separation from the new, and the consequent weakness of argument drawn from mediæval times.

Mr. Chief Justice Waite made the basis of his judgment the custom "in England from time immemorial and in this country from its first colonization to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished and articles sold."

We very respectfully deny the custom or the right to regulate the price of bread. Cooley's Constitutional Limitations, 736, *n.* 3; *Mobile* v. *Yuille*, 3 Alabama, 137; *S. C.* 36 Am. Dec. 441.

Mills were regulated at first, and the toll which the miller might take was prescribed, because to grind grain was a franchise and might not be done without permission from the king or the lord of the manor. 15 Viner's Abridgment, 398; Cooley's Constitutional Limitations (5th ed.) 736; *Hix* v. *Gardiner*, 2 Bulstr. 195.

Hackmen have a *legal monopoly.* It is a trade which the law can prohibit and suppress, but which it licenses and controls instead. The right to ply vehicles for hire from exclusive stands in the streets is not a natural right, but wholly acquired from the State, which of course has the right to prescribe terms to the privilege it creates. Cooley's Constitutional Limitations (5th ed.) 736.

To have a ferry is a franchise, and the governmental control is based on the fact that the right to use a boat for ferriage must come by state grant, which prescribes the conditions of the use. Sir Matthew Hale, *De Portibus Maris*, quoted by Chief Justice Waite, p. 126; *Mayor* v. *Starin*, 106 N. Y. 1; *Mills* v. *St. Clair County Commissioner*, 4 Illinois (3 Scammon), 53; *Trustees &c.* v. *Tatman*, 13 Illinois, 27.

That private wharves are the rule and public wharves the exception, may be proved from C. J. Waite's quotation from Sir Matthew Hale's text, *De Portibus Maris*. *Munn* v. *Illinois*, 94 U. S. 127. In New York, the Brooklyn wharves are private. *Wetmore* v. *Brooklyn Gas Co.*, 42 N. Y. 384; *Woodruff* v. *Havemeyer*, 106 N. Y. 129. And it is doubtful if warehouses are public in that State. *In re Eureka Warehouse Co.*, 96 N. Y. 42.

In mediæval times common carriers and common farriers were alike bound to practise their art on demand, and show skill in it. *Jackson* v. *Rogers*, 2 Shower, 332. The distinction between public and private carriers was known of old. *Hutton* v. *Osborne*, cited in Selwyn's Nisi Prius, 401. This distinction is still preserved in the law. *Allen* v. *Sackrider*, 37 N. Y. 341; *Fish* v. *Clark*, 49 N. Y. 122.

There was always, then, in every case where a wharf, or a warehouse, or an inn, or a carrier was alleged to be public or common, a question of fact to be determined, viz.: Had the individual done the acts or had his property the antecedents and concomitants which give the public rights to his services and the use of his property? We affirm that this right to have it established in court by evidence that the individual is in the public service is a property right and is guaranteed by the Constitution of the United States.

The opinion of the Chief Justice in *Munn* v. *Illinois*, disposes of this element in the authorities by adjudging that it is a question for the legislature, and presuming in favor of the law that the legislature has decided that all who are within the terms of the law were at its date in a common or public employment, and fit subjects for regulation of prices.

The law of New York here in question attempts to regulate

all elevators in cities of over 130,000 population, viz.: New York, Brooklyn and Buffalo. It in effect declares that all elevators in these cities are and shall be public elevators. We contend that no state of circumstances can exist to justify this statute, and, within the doctrine of all the cases, we ask that it be declared void. It is impossible to justify this law by the precedents relied upon in the *Munn Case.* The elements of publicity are in almost every case wholly within individual control.

There has not been and there cannot be in New York any such situation as existed in Chicago. No man and no set of men in New York can fix a rate of toll and thus tax commerce. There will always be in the port of New York a genuine competition. Our floating elevator is radically different from Munn's warehouse in itself and in its surroundings.

V. This law is unconstitutional and void because it decides that Annan's elevator is not private, and therefore free from legislative control without due process of law. It governs and regulates all elevators in cities having 130,000 population, and the Supreme Court, construing the law, held that no evidence before the magistrate could be considered. The Court of Appeals of New York in its opinion, (117 N. Y. 621,) said: "We are of opinion that the statute of 1888 is constitutional as a whole, and although it may comprehend cases which, standing alone, might not justify legislative interference, yet they must be governed by the general rule enacted by the legislature."

We take issue at this point: Ours is, we contend, a case comprehended by the statute, yet not justifying legislative interference, and we submit as the true rule that if one single case falls within the statute whose antecedents and concomitants do not justify legislative coercion, the law is void. *The People* v. *Marx*, 99 N. Y. 377; *Morgan* v. *King*, 35 N. Y. 454; *S. C.* 91 Am. Dec. 58; *In the Matter of Jacobs*, 98 N. Y. 98; *Ervine's Appeal*, 16 Penn. St. 266; *S. C.* 55 Am. Dec. 499; *Hurtado* v. *California*, 110 U. S. 516.

VI. This law violates the Constitution of the United States in that it refuses to and takes from elevator owners the equal protection of the laws.

By this act owners of elevators in cities of less than 130,000 inhabitants are left free to make their own bargains, while in cities of over 130,000 population they are constrained to take the statutory rate.

Yonkers is a city of less than 130,000 inhabitants and so is Long Island City. The former adjoins New York City and the latter is separated from it only by the East River, and only a narrow creek — perhaps two hundred feet wide — separates Brooklyn and Long Island City. In Yonkers or Long Island City or in Albany or Rochester an elevator owner is free, while in Brooklyn, Buffalo and New York they are deprived of their freedom. Such a law deprives elevator owners in the larger cities of the equal protection of the laws. *The Railroad Tax Cases*, 13 Fed. Rep. 722; *Santa Clara County* v. *Southern Pacific Railroad*, 118 U. S. 394; *Barbier* v. *Connolly*, 113 U. S. 27; *Hayes* v. *Missouri*, 120 U. S. 68.

Mr. Spencer Clinton for Budd, plaintiff in error.

Mr. J. A. Hyland for the defendants in error in 644 and 645.

Mr. George T. Quinby filed a brief for the defendants in error in 719.

Mr. Justice Blatchford, after stating the case, delivered the opinion of the court.

The main question involved in these cases is whether this court will adhere to its decision in *Munn* v. *Illinois*, 94 U. S. 113.

The Court of Appeals of New York, in *People* v. *Budd*, 117 N. Y. 1, held that chapter 581 of the laws of 1888 did not violate the constitutional guarantee protecting private property, but was a legitimate exercise of the police power of the State over a business affected with a public interest. In regard to the indictment against Budd, it held that the charge of exacting more than the statute rate for elevating was proved, and that as to the alleged overcharge for shovelling, it

appeared that the carrier was compelled to pay $4 for each 1000 bushels of grain, which was the charge of the shovellers' union, by which the work was performed, and that the union paid the elevator, for the use of the latter's steam shovel, $1.75 for each 1000 bushels. The court held that there was no error in submitting to the jury the question as to the overcharge for shovelling; that the intention of the statute was to confine the charge to the "actual cost" of the outside labor required; and that a violation of the act in that particular was proved; but that, as the verdict and sentence were justified by proof of the overcharge for elevating, even if the alleged overcharge for shovelling was not made out, the ruling of the Superior Court of Buffalo could not have prejudiced Budd. Of course, this court, in these cases, can consider only the Federal questions involved.

It is claimed, on behalf of Budd, that the statute of the State of New York is unconstitutional, because contrary to the provisions of section 1 of the Fourteenth Amendment to the Constitution of the United States, in depriving the citizen of his property without due process of law; that it is unconstitutional in fixing the maximum charge for elevating, receiving, weighing and discharging grain by means of floating and stationary elevators and warehouses at five-eighths of one cent a bushel and in forbidding the citizen to make any profit upon the use of his property or labor; and that the police power of the State extends only to property or business which is devoted by its owner to the public, by a grant to the public of the right to demand its use. It is claimed on behalf of Annan and Pinto that floating and stationary elevators in the port of New York are private property, not affected with any public interest, and not subject to the regulation of rates.

"Trimming" in the canal-boat, spoken of in the statute, is shovelling the grain from one place to another, and is done by longshoremen with scoops or shovels; and "trimming" the ship's cargo when loading is stowing it and securing it for the voyage. Floating elevators are primarily boats. Some are scows, and have to be towed from place to place by steam tugs; but the majority are propellers. When the floating elevator

arrives at the ship and makes fast alongside of her, the canal-boat carrying the grain is made fast on the other side of the elevator. A long wooden tube, called "the leg of the elevator," and spoken of in the statute, is lowered from the tower of the elevator so that its lower end enters the hold of the canal-boat in the midst of the grain. The "spout" of the elevator is lowered into the ship's hold. The machinery of the elevator is then set in motion, the grain is elevated out of the canal-boat, received and weighed in the elevator, and discharged into the ship. The grain is lifted in "buckets" fastened to an endless belt which moves up and down in the leg of the elevator. The lower end of the leg is buried in the grain so that the buckets are submerged in it. As the belt moves, each bucket goes up full of grain, and at the upper end of the leg, in the elevator tower, empties its contents into the hopper which receives the grain. The operation would cease unless the grain was trimmed or shovelled to the leg as fast as it is carried up by the buckets. There is a gang of longshoremen who shovel the grain from all parts of the hold of the canal-boat to "the leg of the elevator," so that the buckets may be always covered with grain at the lower end of the leg. This "trimming or shovelling to the leg of the elevator," when the canal-boat is unloading, is that part of the work which the elevator owner is required to do at the "actual cost."

In the Budd and Pinto cases, the elevator was a stationary one on land; and in the Annan case, it was a floating elevator. In the Budd case, the Court of Appeals held that the words "actual cost," used in the statute, were intended to exclude any charge by the elevator beyond the sum specified, for the use of its machinery in shovelling, and the ordinary expenses of operating it, and to confine the charge to the actual cost of the outside labor required for trimming and bringing the grain to the leg of the elevator; and that the purpose of the statute could be easily evaded and defeated if the elevator owner were permitted to separate the services, and charge for the use of the steam shovel any sum which might be agreed upon between him and the shovellers' union, and thereby, under color of charging for the use of his steam shovel, exact from the

carrier a sum for elevating beyond the rate fixed therefor by the statute.

The Court of Appeals, in its opinion in the Budd case, considered fully the question as to whether the legislature had power, under the constitution of the State of New York, to prescribe a maximum charge for elevating grain by stationary elevators, owned by individuals or corporations who had appropriated their property to that use and were engaged in that business; and it answered the inquiry in the affirmative. It also reviewed the case of *Munn* v. *Illinois*, 94 U. S. 113, and arrived at the conclusion that this court there held that the legislation in question in that case was a lawful exercise of legislative power, and did not infringe that clause of the Fourteenth Amendment to the Constitution of the United States which provides that no State shall "deprive any person of life, liberty or property without due process of law;" and that the legislation in question in that case was similar to, and not distinguishable in principle from, the act of the State of New York.

In regard to *Munn* v. *Illinois*, the Court of Appeals said that the question in that case was raised by an individual owning an elevator and warehouse in Chicago, erected for, and in connection with which he had carried on, the business of elevating and storing grain, many years prior to the passage of the act in question, and prior also to the adoption of the amendment to the constitution of Illinois in 1870, declaring all elevators and warehouses, where grain or other property is stored for a compensation, to be public warehouses. The Court of Appeals then cited the cases of *People ex rel. etc.* v. *B. & A. R. R. Co.*, 70 N. Y. 569; *Bertholf* v. *O'Reilly*, 74 N. Y. 509; *B. E. S. R. R. Co.* v. *B. S. R. R. Co.*, 111 N. Y. 132; and *People* v. *King*, 110 N. Y. 418, as cases in which *Munn* v. *Illinois* had been referred to by it, and said that it could not overrule and disregard *Munn* v. *Illinois* without subverting the principle of its own decision in *People* v. *King*, and certainly not without disregarding many of its deliberate expressions in approval of the principle of *Munn* v. *Illinois*.

The Court of Appeals further examined the question whether

the power of the legislature to regulate the charge for elevating grain, where the business was carried on by individuals upon their own premises, fell within the scope of the police power, and whether the statute in question was necessary for the public welfare. It affirmed that, while no general power resided in the legislature to regulate private business, prescribe the conditions under which it should be conducted, fix the price of commodities or services or interfere with freedom of contract, and while the merchant, manufacturer, artisan and laborer, under our system of government, are left to pursue and provide for their own interests in their own way, untrammelled by burdensome and restrictive regulations, which, however common in rude and irregular times, are inconsistent with constitutional liberty, yet there might be special conditions and circumstances which brought the business of elevating grain within principles which, by the common law and the practice of free governments, justified legislative control and regulation in the particular case, so that the statute would be constitutional; that the control which, by common law and by statute, was exercised over common carriers, was conclusive upon the point that the right of the legislature to regulate the charges for services in connection with the use of property did not depend in every case upon the question whether there was a legal monopoly, or whether special governmental privileges or protection had been bestowed; that there were elements of publicity in the business of elevating grain which peculiarly affected it with a public interest; that those elements were found in the nature and extent of the business, its relation to the commerce of the State and country, and the practical monopoly enjoyed by those engaged in it; that about 120,000,000 bushels of grain come annually to Buffalo from the West; that the business of elevating grain at Buffalo is connected mainly with lake and canal transportation; that the grain received at New York in 1887 by way of the Erie Canal and Hudson River, during the season of canal navigation, exceeded 46,000,000 bushels, an amount very largely in excess of the grain received during the same period by rail and by river and coastwise vessels; that the elevation of that grain from lake vessels to canal-boats

takes place at Buffalo, where there are thirty or forty elevators, stationary and floating; that a large proportion of the surplus cereals of the country passes through the elevators at Buffalo and finds its way through the Erie Canal and Hudson River to the seaboard at New York, whence it is distributed to the markets of the world; that the business of elevating grain is an incident to the business of transportation, the elevators being indispensable instrumentalities in the business of the common carrier, and in a broad sense performing the work of carriers, being located upon or adjacent to the waters of the State, and transferring the cargoes of grain from the lake vessels to the canal-boats, or from the canal-boats to the ocean vessels, and thereby performing an essential service in transportation; that by their means the transportation of grain by water from the upper lakes to the seaboard is rendered possible; that the business of elevating grain thus has a vital relation to commerce in one of its most important aspects; that every excessive charge made in the course of the transportation of grain is a tax upon commerce; that the public has a deep interest that no exorbitant charges shall be exacted at any point, upon the business of transportation; and that whatever impaired the usefulness of the Erie Canal as a highway of commerce involved the public interest.

The Court of Appeals said that, in view of the foregoing exceptional circumstances, the business of elevating grain was affected with a public interest, within the language of Lord Chief Justice Hale, in his treatise *De Portibus Maris*, (Harg. Law Tracts, 78;) that the case fell within the principle which permitted the legislature to regulate the business of common carriers, ferrymen and hackmen, and interest on the use of money; that the underlying principle was, that business of certain kinds holds such a peculiar relation to the public interest that there is superinduced upon it the right of public regulation; and that the court rested the power of the legislature to control and regulate elevator charges upon the nature and extent of the business, the existence of a virtual monopoly, the benefit derived from the Erie Canal's creating the business and making it possible, the interest to trade and commerce,

the relation of the business to the property and welfare of the State, and the practice of legislation in analogous cases, collectively creating an exceptional case and justifying legislative regulation.

The opinion further said that the criticism to which the case of *Munn* v. *Illinois* had been subjected proceeded mainly upon a limited and strict construction and definition of the police power; that there was little reason, under our system of government, for placing a close and narrow interpretation on the police power, or restricting its scope so as to hamper the legislative power in dealing with the varying necessities of society and the new circumstances as they arise calling for legislative intervention in the public interest; and that no serious invasion of constitutional guarantees by the legislature could withstand for a long time the searching influence of public opinion, which was sure to come sooner or later to the side of law, order and justice, however it might have been swayed for a time by passion or prejudice, or whatever aberrations might have marked its course.

We regard these views which we have referred to as announced by the Court of Appeals of New York, so far as they support the validity of the statute in question, as sound and just.

In *Munn* v. *Illinois*, the constitution of Illinois, adopted in 1870, provided in article 13, section 1, as follows: "All elevators or storehouses, where grain or other property is stored for a compensation, whether the property stored be kept separated or not, are declared to be public warehouses;" and the act of the legislature of Illinois approved April 25, 1871, (Public Laws of Illinois, of 1871–72, p. 762,) divided public warehouses into three classes, prescribed the taking of a license and the giving of a bond, and fixed a maximum charge, for warehouses belonging to class A, for storing and handling grain, including the cost of receiving and delivering, and imposed a fine on conviction for not taking the license or not giving the bond. Munn and Scott were indicted, convicted and fined for not taking out the license and not giving the bond, and for charging rates for storing and handling grain

higher than those established by the act. Section 6 of the act provided that it should be the duty of every warehouseman of class A to receive for storage any grain that might be tendered to him. Munn and Scott were the managers and lessees of a public warehouse, such as was named in the statute. The Supreme Court of Illinois having affirmed the judgment of conviction against them, on the ground that the statute of Illinois was a valid and constitutional enactment, *Munn* v. *People*, 69 Illinois, 80, they sued out a writ of error from this court, and contended that the provisions of the sections of the statute of Illinois which they were charged with having violated were repugnant to the third clause of § 8 of article 1, and the sixth clause of § 9 of article 1, of the Constitution of the United States, and to the Fifth and Fourteenth Amendments of that Constitution.

This court, in *Munn* v. *Illinois*, the opinion being delivered by Chief Justice Waite, and there being a published dissent by only two justices, considered carefully the question of the repugnancy of the Illinois statute to the Fourteenth Amendment. It said, that under the powers of government inherent in every sovereignty, "the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good;" and that, "in their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, inn-keepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold." It was added: "To this day, statutes are to be found in many of the States upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property." It announced as its conclusions that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due

process of law; that, when private property was devoted to a public use, it was subject to public regulation; that Munn and Scott, in conducting the business of their warehouse, pursued a public employment and exercised a sort of public office, in the same sense as did a common carrier, miller, ferryman, inn-keeper, wharfinger, baker, cartman or hackney coachman; that they stood in the very gateway of commerce and took toll from all who passed; that their business tended "to a common charge," and had become a thing of public interest and use; that the toll on the grain was a common charge; and that, according to Lord Chief Justice Hale, every such warehouseman "ought to be under a public regulation, viz.:" that he "take but reasonable toll."

This court further held in *Munn* v. *Illinois*, that the business in question was one in which the whole public had a direct and positive interest; that the statute of Illinois simply extended the law so as to meet a new development of commercial progress; that there was no attempt to compel the owners of the warehouses to grant the public an interest in their property, but to declare their obligations if they used it in that particular manner; that it mattered not that Munn and Scott had built their warehouses and established their business before the regulations complained of were adopted; that, the property being clothed with a public interest, what was a reasonable compensation for its use was not a judicial, but a legislative question; that, in countries where the common law prevailed, it had been customary from time immemorial for the legislature to declare what should be a reasonable compensation under such circumstances, or to fix a maximum beyond which any charge made would be unreasonable; that the warehouses of Munn and Scott were situated in Illinois and their business was carried on exclusively in that State; that the warehouses were no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another; that their regulation was a thing of domestic concern; that, until Congress acted in reference to their interstate relations, the State might exercise all the powers of government over them, even though

in so doing it might operate indirectly upon commerce outside its immediate jurisdiction; and that the provision of § 9 of article 1 of the Constitution of the United States operated only as a limitation of the powers of Congress, and did not affect the States in the regulation of their domestic affairs. The final conclusion of the court was, that the act of Illinois was not repugnant to the Constitution of the United States; and the judgment was affirmed.

In *Sinking Fund Cases*, 99 U. S. 700, 747, Mr. Justice Bradley, who was one of the justices who concurred in the opinion of the court in *Munn* v. *Illinois*, speaking of that case, said: "The inquiry there was as to the extent of the police power in cases where the public interest is affected; and we held that when an employment or business becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen; in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community, it is subject to regulation by the legislative power." Although this was said in a dissenting opinion in *Sinking Fund Cases*, it shows what Mr. Justice Bradley regarded as the principle of the decision in *Munn* v. *Illinois*.

In *Spring Valley Water Works* v. *Schottler*, 110 U. S. 347, 354, this court said: "That it is within the power of the government to regulate the prices at which water shall be sold by one who enjoys a virtual monopoly of the sale, we do not doubt. That question is settled by what was decided on full consideration in *Munn* v. *Illinois*, 94 U. S. 113. As was said in that case, such regulations do not deprive a person of his property without due process of law."

In *Wabash &c. Railway Co.* v. *Illinois*, 118 U. S. 557, 569, Mr. Justice Miller, who had concurred in the judgment in *Munn* v. *Illinois*, referred, in delivering the opinion of the court, to that case, and said: "That case presented the question of a private citizen, or unincorporated partnership, engaged in the warehousing business in Chicago, free from any claim of right or contract under an act of incorporation of any State whatever, and free from the question of continuous

transportation through several States. And in that case the court was presented with the question, which it decided, whether any one engaged in a public business, in which all the public had a right to require his service, could be regulated by acts of the legislature in the exercise of this public function and public duty, so far as to limit the amount of charges that should be made for such services."

In *Dow* v. *Beidelman*, 125 U. S. 680, 686, it was said by Mr. Justice Gray, in delivering the opinion of the court, that in *Munn* v. *Illinois* the court, after affirming the doctrine that by the common law carriers or other persons exercising a public employment could not charge more than a reasonable compensation for their services, and that it is within the power of the legislature "to declare what shall be a reasonable compensation for such services, or, perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable," said that to limit the rate of charges for services rendered in the public employment, or for the use of property in which the public has an interest, was only changing a regulation which existed before, and established no new principle in the law, but only gave a new effect to an old one.

In *Chicago &c. Railway Co.* v. *Minnesota*, 134 U. S. 418, 461, it was said by Mr. Justice Bradley, in his dissenting opinion, in which Mr. Justice Gray and Mr. Justice Lamar concurred, that the decision of the court in that case practically overruled *Munn* v. *Illinois;* but the opinion of the court did not say so, nor did it refer to *Munn* v. *Illinois;* and we are of opinion that the decision in the case in 134 U. S. is, as will be hereafter shown, quite distinguishable from the present cases.

It is thus apparent that this court has adhered to the decision in *Munn* v. *Illinois* and to the doctrines announced in the opinion of the court in that case; and those doctrines have since been repeatedly enforced in the decisions of the courts of the States.

In *Railway* v. *Railway*, 30 Ohio St. 604, 616, in 1877, it was said, citing *Munn* v. *Illinois:* "When the owner of property devotes it to a public use, he, in effect, grants to the public

an interest in such use, and must, to the extent of the use, submit to be controlled by the public, for the common good, as long as he maintains the use." That was a decision by the Supreme Court Commission of Ohio.

In *State* v. *Gas Company*, 34 Ohio St. 572, 582, in 1878, *Munn* v. *Illinois* was cited with approval, as holding that where the owner of property devotes it to a use in which the public have an interest, he in effect grants to the public an interest in such use, and must, to the extent of that interest, submit to be controlled by the public, for the common good, so long as he maintains the use; and the court added that in *Munn* v. *Illinois* the principle was applied to warehousemen engaged in receiving and storing grain; that it was held that their rates of charges were subject to legislative regulation; and that the principle applied with greater force to corporations when they were invested with franchises to be exercised to subserve the public interest.

The Supreme Court of Illinois, in *Ruggles* v. *People*, 91 Illinois, 256, 262, in 1878, cited *Munn* v. *People*, 69 Illinois, 80, which was affirmed in *Munn* v. *Illinois*, as holding that it was competent for the general assembly to fix the maximum charges by individuals keeping public warehouses for storing, handling and shipping grain, and that, too, when such persons had derived no special privileges from the State, but were, as citizens of the State, exercising the business of storing and handling grain for individuals.

The Supreme Court of Alabama, in *Davis* v. *The State*, 68 Alabama, 58, in 1880, held that a statute declaring it unlawful, within certain counties, to transport or move, after sunset and before sunrise of the succeeding day, any cotton in the seed, but permitting the owner or purchaser to remove it from the field to a place of storage, was not unconstitutional. Against the argument that the statute was such a despotic interference with the rights of private property as to be tantamount, in its practical effect, to a deprivation of ownership "without due process of law," the court said that the statute sought only to regulate and control the transportation of cotton in one particular condition of it, and was a mere police

regulation, to which there was no constitutional objection, citing *Munn* v. *Illinois*. It added, that the object of the statute was to regulate traffic in the staple agricultural product of the State, so as to prevent a prevalent evil, which, in the opinion of the law-making power, might do much to demoralize agricultural labor and to destroy the legitimate profits of agricultural pursuits, to the public detriment, at least within the specified territory.

In *Baker* v. *The State*, 54 Wisconsin, 368, 373, in 1882, *Munn* v. *Illinois* was cited with approval by the Supreme Court of Wisconsin, as holding that the legislature of Illinois had power to regulate public warehouses, and the warehousing and inspection of grain within that State, and to enforce its regulations by penalties, and that such legislation was not in conflict with any provision of the Federal Constitution.

The Court of Appeals of Kentucky, in 1882, in *Nash* v. *Page*, 80 Kentucky, 539, 545, cited *Munn* v. *Illinois*, as applicable to the case of the proprietors of tobacco warehouses in the city of Louisville, and held that the character of the business of the tobacco warehousemen was that of a public employment, such as made them subject, in their charges and their mode of conducting business, to legislative regulation and control, as having a practical monopoly of the sales of tobacco at auction.

In 1884, the Supreme Court of Pennsylvania, in *Girard Storage Co.* v. *Southwark Co.*, 105 Penn. St. 248, 252, cited *Munn* v. *Illinois* as involving the rights of a private person, and said that the principle involved in the ruling of this court was, that where the owner of such property as a warehouse devoted it to a use in which the public had an interest, he in effect granted to the public an interest in such use, and must, therefore, to the extent thereof, submit to be controlled by the public for the common good, as long as he maintained that use.

In *Sawyer* v. *Davis*, 136 Mass. 239, in 1884, the Supreme Judicial Court of Massachusetts said that nothing is better established than the power of the legislature to make what are called police regulations, declaring in what manner prop-

erty shall be used and enjoyed and business carried on, with a view to the good order and benefit of the community, even though they may interfere to some extent with the full enjoyment of private property, and although no compensation is given to a person so inconvenienced; and *Munn* v. *Illinois* was cited as holding that the rules of the common law which had from time to time been established, declaring or limiting the right to use or enjoy property, might themselves be changed as occasion might require.

The Supreme Court of Indiana, in 1885, in *Brechbill* v. *Randall*, 102 Indiana, 528, held that a statute was valid which required persons selling patent rights to file with the clerk of the county a copy of the patent, with an affidavit of genuineness and authority to sell, on the ground that the State had power to make police regulations for the protection of its citizens against fraud and imposition; and the court cited *Munn* v. *Illinois* as authority.

The Supreme Court of Nebraska, in 1885, in *Webster Telephone Case*, 17 Nebraska, 126, held that when a corporation or person assumed and undertook to supply a public demand, made necessary by the requirements of the commerce of the country, such as a public telephone, such demand must be supplied to all alike, without discrimination; and *Munn* v. *Illinois* was cited by the prevailing party and by the court. The defendant was a corporation, and had assumed to act in a capacity which was to a great extent public, and had undertaken to satisfy a public want or necessity, although it did not possess any special privileges by statute or any monopoly of business in a given territory; yet it was held that, from the very nature and character of its business, it had a monopoly of the business which it transacted. The court said that no statute had been deemed necessary to aid the courts in holding that where a person or company undertook to supply a public demand, which was "affected with a public interest," it must supply all alike who occupied a like situation, and not discriminate in favor of or against any.

In *Stone* v. *Yazoo & Miss. Valley R. Co.*, 62 Mississippi, 607, 639, the Supreme Court of Mississippi, in 1885, cited

Munn v. *Illinois* as deciding that the regulation of warehouses for the storage of grain, owned by private individuals, and situated in Illinois, was a thing of domestic concern and pertained to the State, and as affirming the right of the State to regulate the business of one engaged in a public employment therein, although that business consisted in storing and transferring immense quantities of grain in its transit from the fields of production to the markets of the world.

In *Hockett* v. *The State*, 105 Indiana, 250, 258, in 1885, the Supreme Court of Indiana held that a statute of the State which prescribed the maximum price which a telephone company should charge for the use of its telephones was constitutional, and that in legal contemplation all the instruments and appliances used by a telephone company in the transaction of its business were devoted to a public use, and the property thus devoted became a legitimate subject of legislative regulation. It cited *Munn* v. *Illinois* as a leading case in support of that proposition, and said that although that case had been the subject of comment and criticism, its authority as a precedent remained unshaken. This doctrine was confirmed in *Central Union Telephone Co.* v. *Bradbury*, 106 Indiana, 1, in the same year, and in *Central Union Telephone Co.* v. *The State*, 118 Indiana, 194, 207, in 1888, in which latter case *Munn* v. *Illinois* was cited by the court.

In *Chesapeake & Potomac Telephone Co.* v. *Balto. & Ohio Telegraph Co.*, 66 Maryland, 399, 414, in 1886, it was held that the telegraph and the telephone were public vehicles of intelligence, and those who owned or controlled them could no more refuse to perform impartially the functions which they had assumed to discharge than a railway company, as a common carrier, could rightfully refuse to perform its duty to the public; and that the legislature of the State had full power to regulate the services of telephone companies, as to the parties to whom facilities should be furnished. The court cited *Munn* v. *Illinois*, and said that it could no longer be controverted that the legislature of a State had full power to regulate and control, at least within reasonable limits, public employments and property used in connection therewith; that

the operation of the telegraph and the telephone in doing a general business was a public employment, and the instruments and appliances used were property devoted to a public use and in which the public had an interest; and that, such being the case, the owner of the property thus devoted to public use must submit to have that use and employment regulated by public authority for the common good.

In the Court of Chancery of New Jersey, in 1889, in *Delaware &c. Railroad Co.* v. *Central Stock-Yard Co.*, 45 N. J. Eq. 50, 60, it was held that the legislature had power to declare what services warehousemen should render to the public, and to fix the compensation that might be demanded for such services; and the court cited *Munn* v. *Illinois* as properly holding that warehouses for the storage of grain must be regarded as so far public in their nature as to be subject to legislative control, and that when a citizen devoted his property to a use in which the public had an interest, he in effect granted to the public an interest in that use, and rendered himself subject to control, in that use, by the body politic.

In *Zanesville* v. *Gas-Light Company*, 47 Ohio St. 1, in 1889, it was said by the Supreme Court of Ohio, that the principle was well established, that where the owner of property devotes it to a use in which the public have an interest, he in effect grants to the public an interest in such use, and must to the extent of that interest submit to be controlled by the public for the common good, as long as he maintains the use; and that such was the point of the decision in *Munn* v. *Illinois*.

We must regard the principle maintained in *Munn* v. *Illinois* as firmly established; and we think it covers the present cases, in respect to the charge for elevating, receiving, weighing and discharging the grain, as well as in respect to the charge for trimming and shovelling to the leg of the elevator when loading, and trimming the cargo when loaded. If the shovellers or scoopers chose, they might do the shovelling by hand, or might use a steam-shovel. A steam-shovel is owned by the elevator owner, and the power for operating it is fur-

nished by the engine of the elevator; and if the scooper uses the steam-shovel, he pays the elevator owner for the use of it.

The answer to the suggestion that by the statute the elevator owner is forbidden to make any profit from the business of shovelling to the leg of the elevator is that made by the Court of Appeals of New York in the case of Budd, that the words "actual cost," used in the statute, were intended to exclude any charge by the elevator owner, beyond the sum specified for the use of his machinery in shovelling and the ordinary expenses of operating it, and to confine the charge to the actual cost of the outside labor required for trimming and bringing the grain to the leg of the elevator; and that the purpose of the statute could be easily evaded and defeated if the elevator owner was permitted to separate the services, and to charge for the use of his steam-shovel any sum which might be agreed upon between himself and the shovellers' union, and thereby, under color of charging for the use of his steam-shovel, to exact of the carrier a sum for elevating beyond the rate fixed by the statute.

We are of opinion that the act of the legislature of New York is not contrary to the Fourteenth Amendment to the Constitution of the United States, and does not deprive the citizen of his property without due process of law; that the act, in fixing the maximum charges which it specifies, is not unconstitutional, nor is it so in limiting the charge for shovelling to the actual cost thereof; and that it is a proper exercise of the police power of the State.

On the testimony in the cases before us the business of elevating grain is a business charged with a public interest, and those who carry it on occupy a relation to the community analogous to that of common carriers. The elevator owner, in fact, retains the grain in his custody for an appreciable period of time, because he receives it into his custody, weighs it, and then discharges it, and his employment is thus analogous to that of a warehouseman. In the actual state of the business the passage of the grain to the city of New York and other places on the seaboard would, without the use of eleva

tors, be practically impossible. The elevator at Buffalo is a link in the chain of transportation to the seaboard, and the elevator in the harbor of New York is a like link in the transportation abroad by sea. The charges made by the elevator influence the price of grain at the point of destination on the seaboard, and that influence extends to the prices of grain at the places abroad to which it goes. The elevator is devoted by its owner, who engages in the business, to a use in which the public has an interest, and he must submit to be controlled by public legislation for the common good.

It is contended in the briefs for the plaintiffs in error in the Annan and Pinto cases that the business of the relators in handling grain was wholly private, and not subject to regulation by law; and that they had received from the State no charter, no privileges and no immunity, and stood before the law on a footing with the laborers they employed to shovel grain, and were no more subject to regulation than any other individual in the community. But these same facts existed in *Munn* v. *Illinois*. In that case, the parties offending were private individuals, doing a private business, without any privilege or monopoly granted to them by the State. Not only is the business of elevating grain affected with a public interest, but the records show that it is an actual monopoly, besides being incident to the business of transportation and to that of a common carrier, and thus of a quasi-public character. The act is also constitutional as an exercise of the police power of the State.

So far as the statute in question is a regulation of commerce, it is a regulation of commerce only on the waters of the State of New York. It operates only within the limits of that State, and is no more obnoxious as a regulation of interstate commerce than was the statute of Illinois in respect to warehouses, in *Munn* v. *Illinois*. It is of the same character with navigation laws in respect to navigation within the State, and laws regulating wharfage rates within the State, and other kindred laws.

It is further contended that, under the decision of this court in *Chicago &c. Railway Co.* v. *Minnesota*, 134 U. S. 418, the

fixing of elevator charges is a judicial question, as to whether they are reasonable or not; that the statute must permit and provide for a judicial settlement of the charges; and that, by the statute under consideration, an arbitrary rate is fixed and all inquiry is precluded as to whether that rate is reasonable or not.

But this is a misapprehension of the decision of this court in the case referred to. In that case, the legislature of Minnesota had passed an act which established a railroad and warehouse commission, and the Supreme Court of that State had interpreted the act as providing that the rates of charges for the transportation of property by railroads, recommended and published by the commission, should be final and conclusive as to what were equal and reasonable charges, and that there could be no judicial inquiry as to the reasonableness of such rates. A railroad company, in answer to an application for a mandamus, contended that such rates in regard to it were unreasonable, and, as it was not allowed by the State Court to put in testimony in support of its answer, on the question of the reasonableness of such rates, this court held that the statute was in conflict with the Constitution of the United States, as depriving the company of its property without due process of law, and depriving it of the equal protection of the laws. That was a very different case from one under the statute of New York in question here, for in this instance the rate of charges is fixed directly by the legislature. See *Spencer* v. *Merchant*, 125 U. S. 345, 356. What was said in the opinion of the court in 134 U. S. had reference only to the case then before the court, and to charges fixed by a commission appointed under an act of the legislature, under a Constitution of the State which provided that all corporations, being common carriers, should be bound to carry "on equal and reasonable terms," and under a statute which provided that all charges made by a common carrier for the transportation of passengers or property should be "equal and reasonable."

What was said in the opinion in 134 U. S., as to the question of the reasonableness of the rate of charge being one for judicial investigation, had no reference to a case where the

rates are prescribed directly by the legislature. Not only was that the case in the statute of Illinois in *Munn* v. *Illinois*, but the doctrine was laid down by this court in *Wabash &c. Railway Co.* v. *Illinois*, 118 U. S. 557, 568, that it was the right of a State to establish limitations upon the power of railroad companies to fix the price at which they would carry passengers and freight, and that the question was of the same character as that involved in fixing the charges to be made by persons engaged in the warehousing business. So, too, in *Dow* v. *Beidelman*, 125 U. S. 680, 686, it was said that it was within the power of the legislature to declare what should be a reasonable compensation for the services of persons exercising a public employment, or to fix a maximum beyond which any charge made would be unreasonable.

But in *Dow* v. *Beidelman*, after citing *Munn* v. *Illinois*, 94 U. S. 113; *Chicago, Burlington & Quincy Railroad* v. *Iowa*, 94 U. S. 155, 161, 162; *Peik* v. *Chicago & Northwestern Railway*, 94 U. S. 164, 178; *Chicago, Milwaukee & St. Paul Railroad* v. *Ackley*, 94 U. S. 179; *Winona & St. Peter Railroad* v. *Blake*, 94 U. S. 180; *Stone* v. *Wisconsin*, 94 U. S. 181; *Ruggles* v. *Illinois*, 108 U. S. 526; *Illinois Central Railroad* v. *Illinois*, 108 U. S. 541; *Stone* v. *Farmers' Loan & Trust Co.*, 116 U. S. 307; *Stone* v. *Illinois Central Railroad*, 116 U. S. 347; and *Stone* v. *New Orleans & Northeastern Railroad*, 116 U. S. 352, as recognizing the doctrine that the legislature may itself fix a maximum beyond which any charge would be unreasonable, in respect to services rendered in a public employment, or for the use of property in which the public has an interest, subject to the proviso that such power of limitation or regulation is not without limit, and is not a power to destroy, or a power to compel the doing of the services without reward, or to take private property for public use without just compensation or without due process of law, the court said that it had no means, "if it would under any circumstances have the power," of determining that the rate fixed by the legislature in that case was unreasonable, and that it did not appear that there had been any such confiscation of property as amounted to a taking of it without due process of law,

or that there had been any denial of the equal protection of the laws.

In the cases before us, the records do not show that the charges fixed by the statute are unreasonable, or that property has been taken without due process of law, or that there has been any denial of the equal protection of the laws; even if under any circumstances we could determine that the maximum rate fixed by the legislature was unreasonable.

In *Georgia Banking Co.* v. *Smith*, 128 U. S. 174, 179, in the opinion of the court, delivered by Mr. Justice Field, it was said that this court had adjudged in numerous instances that the legislature of a State had the power to prescribe the charges of a railroad company for the carriage of persons and merchandise within its limits, in the absence of any contract to the contrary, subject to the limitation that the carriage is not required without reward, or upon conditions amounting to the taking of property for public use without just compensation, and that what is done does not amount to a regulation of foreign or interstate commerce.

It is further contended for the plaintiffs in error that the statute in question violates the Fourteenth Amendment, because it takes from the elevator owners the equal protection of the laws, in that it applies only to places which have 130,000 population or more, and does not apply to places which have less than 130,000 population, and thus operates against elevator owners in the larger cities of the State. The law operates equally on all elevator owners in places having 130,000 population or more; and we do not perceive how they are deprived of the equal protection of the laws, within the meaning of the Fourteenth Amendment.

Judgments affirmed.

Mr. Justice Brewer, with whom concurred Mr. Justice Field and Mr. Justice Brown, dissenting.

I dissent from the opinion and judgment in these cases. The main proposition upon which they rest is, in my judgment, radically unsound. It is the doctrine of *Munn* v. *Illinois*, 94

U. S. 113, reaffirmed. That is, as declared in the syllabus and stated in the opinion in that case: "When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created." The elaborate discussions of the question in the dissenting opinions in that case, and the present cases when under consideration in the Court of Appeals of the State of New York, seem to forbid anything more than a general declaration of dissent. The vice of the doctrine is, that it places a public interest in the use of property upon the same basis as a public use of property. Property is devoted to a public use when, and only when, the use is one which the public in its organized capacity, to wit, the State, has a right to create and maintain, and, therefore, one which all the public have a right to demand and share in. The use is public, because the public may create it, and the individual creating it is doing thereby and *pro tanto* the work of the State. The creation of all highways is a public duty. Railroads are highways. The State may build them. If an individual does that work, he is *pro tanto* doing the work of the State. He devotes his property to a public use. The State doing the work fixes the price for the use. It does not lose the right to fix the price, because an individual voluntarily undertakes to do the work. But this public use is very different from a public interest in the use. There is scarcely any property in whose use the public has no interest. No man liveth unto himself alone, and no man's property is beyond the touch of another's welfare. Everything, the manner and extent of whose use affects the well-being of others, is property in whose use the public has an interest. Take, for instance, the only store in a little village. All the public of that village are interested in it; interested in the quantity and quality of the goods on its shelves, and their prices, in the time at which it opens and closes, and, generally, in the way in which it is managed; in short, interested in the use. Does it follow that that village public has a right to control these matters? That

which is true of the single small store in the village, is also true of the largest mercantile establishment in the great city. The magnitude of the business does not change the principle. There may be more individuals interested, a larger public, but still the public. The country merchant who has a small warehouse in which the neighboring farmers are wont to store their potatoes and grain preparatory to shipment occupies the same position as the proprietor of the largest elevator in New York. The public has in each case an interest in the use, and the same interest, no more and no less. I cannot bring myself to believe that when the owner of property has by his industry, skill and money made a certain piece of his property of large value to many, he has thereby deprived himself of the full dominion over it which he had when it was of comparatively little value; nor can I believe that the control of the public over one's property or business is at all dependent upon the extent to which the public is benefited by it.

Surely the matters in which the public has the most interest, are the supplies of food and clothing; yet can it be that by reason of this interest the State may fix the price at which the butcher must sell his meat, or the vendor of boots and shoes his goods? Men are endowed by their Creator with certain unalienable rights, "life, liberty and the pursuit of happiness;" and to "secure," not grant or create, these rights governments are instituted. That property which a man has honestly acquired he retains full control of, subject to these limitations: First, that he shall not use it to his neighbor's injury, and that does not mean that he must use it for his neighbor's benefit; second, that if he devotes it to a public use, he gives to the public a right to control that use; and, third, that whenever the public needs require, the public may take it upon payment of due compensation.

It is suggested that there is a monopoly, and that that justifies legislative interference. There are two kinds of monopoly; one of law, the other of fact. The one exists when exclusive privileges are granted. Such a monopoly, the law which creates alone can break; and being the creation of law justifies legislative control. A monopoly of fact any one

can break, and there is no necessity for legislative interference. It exists where any one by his money and labor furnishes facilities for business which no one else has. A man puts up in a city the only building suitable for offices. He has therefore a monopoly of that business; but it is a monopoly of fact, which any one can break who, with like business courage puts his means into a similar building. Because of the monopoly feature, subject thus easily to be broken, may the legislature regulate the price at which he will lease his offices? So, here, there are no exclusive privileges given to these elevators. They are not upon public ground. If the business is profitable, any one can build another; the field is open for all the elevators, and all the competition that may be desired. If there be a monopoly, it is one of fact and not of law, and one which any individual can break.

The paternal theory of government is to me odious. The utmost possible liberty to the individual, and the fullest possible protection to him and his property, is both the limitation and duty of government. If it may regulate the price of one service, which is not a public service, or the compensation for the use of one kind of property which is not devoted to a public use, why may it not with equal reason regulate the price of all service, and the compensation to be paid for the use of all property? And if so, "Looking Backward" is nearer than a dream.

I dissent especially in these cases, because the statute in effect compels service without any compensation. It provides that the parties seeking the service of the elevator "shall only be required to pay the actual cost of trimming or shovelling to the leg of the elevator when unloading, and trimming cargo when loading." This work of trimming or shovelling is fully explained in the briefs of counsel. It is work performed by longshoremen with hand-scoops or shovels, on the vessel unloading or receiving the grain. They are not in the regular employ of the elevator; but engaged in an independent service, and yet one whose careful and skilful performance is essential to the successful transfer of grain into and through the elevator. The full service required of the elevator com-

pels its proprietor to employ and superintend the work of these longshoremen. For this work of employment, and superintendence, and for the responsibility for the proper performance of their work, the act says that the proprietor of the elevator shall receive no compensation; he can charge only that which he pays out, the actual cost. I had supposed that no man could be required to render any service to another individual without some compensation.

Again, in the Pinto Case, it appears that Mr. Pinto is the owner of a stationary elevator, built on private grounds. It is not on grounds devoted to a public use, like the right of way of a railroad company. There is nothing to indicate on his part a purpose to dedicate his property to public uses. So far as it is possible to make the business of an elevator a purely private business, he has done so. It will not do to say that the transferring of grain through an elevator is one step in the process of transportation; and that, therefore, they are *quasi* common carriers, discharging a public duty, and subject to public control. They are not carriers in any proper sense of the term. They may facilitate carriage; so does the boxing and packing of goods for transportation. The engineers, firemen, brakemen, and all the thousands of employés of a railroad company are helping the business of transportation; but are they all common carriers simply because their work tends to facilitate the business of transportation; and may the legislature regulate their wages?

But, as I said, I do not care to enter into any extended discussion of the matter. I believe the time is not distant when the evils resulting from this assumption of a power on the part of government to determine the compensation a man may recieve for the use of his property, or the performance of his personal services, will become so apparent that the courts will hasten to declare that government can prescribe compensation only when it grants a special privilege, as in the creation of a corporation, or when the service which is rendered is a public service, or the property is in fact devoted to a public use.

Mr. Justice Field and Mr. Justice Brown concur with me in this dissent.

HOYT *v.* LATHAM.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

No. 173. Argued January 28, 29, 1892. — Decided February 29, 1892.

While it is true that a trustee cannot legally purchase on his own account that which his duty requires him to sell on account of his *cestui que trust*, nor purchase on account of the *cestui que trust* that which he sells on his own account, and that the *cestui que trust* may avoid such a sale even though made without fraud, and without injury to his interests, yet it is also true that such a transaction is not absolutely void in the sense that the purchaser takes no title, and that it may be ratified and affirmed by the *cestui que trust*, either directly or by acquiescence and silent approval; and, in such case, when he has ample notice of the facts, and waits before taking action to set the sale aside until he can see whether the transaction is like to prove a profitable speculation, he is guilty of laches, which amount to a ratification and approval.

Hammond v. *Hopkins*, *ante*, 224, cited and followed.

THE court stated the case as follows:

This was a bill filed by William H. and Edward P. Latham, who are heirs and owners of two-ninths of the estate of their brother Charles F. Latham, against Ashbel H. Barney and his associates to compel an accounting for the proceeds of the sale of an undivided one thirty-seventh interest in certain lands belonging to the estate of the said Latham, and for a decree adjudging the plaintiffs to be the owners of two-ninths of his interest in the unsold lands, and for a conveyance of the same. The suit arose upon the following state of facts:

On the 31st day of October, 1867, a contract was executed between Alfred M. Hoyt, Danford N. Barney, Ashbel H. Barney, Charles F. Latham and five other associates, of the first part, and the Winona and St. Peter Railroad Company of the second part, by which, after reciting that the parties of the first part had loaned and advanced to the corporation large sums of money, and had constructed and equipped 105 miles of its railroad in Minnesota, whereby the corporation had

become indebted to them in a large sum of money, it was provided that certain payments should be made upon that indebtedness by the issue to them of stock and bonds, and that a portion of a Congressional land grant owned by the railroad company should be conveyed in satisfaction of the residue. The land so to be conveyed was as many acres theretofore granted by Congress as the corporation should receive by reason of the construction of such road for a distance of 105 miles westerly from Winona, reserving the right of way and depot grounds. The lands were to be conveyed to the parties of the first part, as they should direct, whenever, and as soon as, the railroad company had obtained title thereto under the acts of Congress. Instead of taking a conveyance of the lands the parties interested elected to take the proceeds of their sales, as they were permitted by the contract to do, and therefore, as they were sold by the railroad company, the proceeds were from time to time paid over to them. The number of acres to which the company was entitled was ascertained by judicial decree to be 514,266 and a fraction.

Charles F. Latham, one of the parties to this contract, and entitled to one thirty-seventh of these lands or their proceeds, died intestate, August 25, 1870, leaving as his only heirs or next of kin nine brothers and sisters, and the children of a deceased sister; and, up to the execution of the agreement hereinafter referred to, his share of such proceeds was deposited in bank to the credit of his estate. One of his sisters had received her share of his estate in advance, and it is conceded that the estate vested in eight brothers and sisters and the children of the deceased sister, each being entitled to an undivided one-ninth of his one thirty-seventh interest. The plaintiffs are two of the brothers, and each became entitled at his death to a one-ninth interest. No legal proceedings were taken for the settlement and distribution of his estate; no administrator was ever appointed, but in accordance with a wish expressed shortly before his death, and for the purpose of saving the expenses of administration, the defendant Ashbel H. Barney took possession of the assets of the estate, and proceeded to distribute them. The estate, exclusive of the inter-

est in the land grant, amounted to $177,962.48, and was substantially all personal property. The defendant Barney held an interest of his own in the land grant, as one of the parties who contracted with the railroad company. Shortly after the death of Mr. Latham, two of his sisters and their husbands orally assented to a sale by the defendant Barney of the interest of the estate in the land contract, for the sum of $10,000, he at that time advising them that it was worth no more.

It does not appear that any of the other heirs were consulted as to this disposition of the interest in the land. Some time prior to the 9th of September, 1871, the defendant Barney entered into an agreement to sell the interest of the estate in these lands for $10,000 to the eight persons, who, with Latham, had by such contract purchased the same from the railroad company, Mr. Barney himself being one of such persons.

At or about this time the defendant Barney caused to be prepared a statement of account between himself and the estate, and a release to be signed by each of the heirs. One copy of this statement was prepared for each of the heirs, and one for Mr. Barney, and they were all sent together to each heir to be signed, and after they were signed, one executed copy was sent to each. One of the copies of this statement and release differed from the others in one particular, hereinafter stated, and all but that one read as follows:

"Whereas Charles F. Latham, late of Irvington, county of Westchester, and State of New York, died intestate, leaving a considerable estate, consisting of personal property, to be distributed among his next of kin, the said Latham having survived his wife and parents and leaving no children or representatives of a child;

"And whereas the next of kin of said Latham entitled to participate in the distribution of said estate, for the purpose of saving the delay and expense incident to legal proceedings to effect such distribution, have agreed among themselves as to the division of said estate, and the amount going to and receivable by each of the said next of kin, whether in money, stock, bonds or other property;

Statement of the Case.

"And whereas the persons entitled to participate in such distribution and who have agreed upon the same, are the following."

Here follow the names and residences of the next of kin, a recital of the advancement to one of the sisters, and a release by her of her interest in the estate to her brothers and sisters; releases by each of the heirs to the others of all claim and demand against the estate; a recital that Barney had in his possession certain of the assets and property of the deceased, which he had surrendered and delivered to the next of kin; and an agreement "that the said parties hereto, in consideration of the premises and of the surrender and delivery to the said next of kin of the aforesaid property and assets, have and each of them hath released . . . and each of them do . . . release, and forever discharge the said Ashbel H. Barney . . . of and from all claims, demands, actions and causes of action on account of the said assets and property of the said Charles F. Latham so in his possession or under his control. In witness whereof," etc.

This was signed by all of the heirs, including the plaintiffs, and a schedule was attached "showing the estate of which the late Charles F. Latham died possessed, and the distribution among the next of kin, in the foregoing agreement mentioned." This estate consisted almost wholly of cash, shares in corporations, bonds and coupons, and other personal property, with the following exception: "Int. in W. & St. P. lands, estimated $10,000." Of the eleven releases the one sent to Edward P. Latham accidentally differed from the others in using, instead of the words above cited, the words, "Interest in W. & St. P. land sales, say $10,000." About January 1, 1872, defendant Barney enclosed to each distributee, with the release and a supplemental statement of the assets, not material here, a check for his or her share of the estate, which was received and retained by each.

Plaintiffs in December, 1876, brought this action upon the ground that the foregoing proceedings and the release executed by them did not divest them of their interest in the lands. The Circuit Court rendered a decree in favor of the

plaintiffs, in accordance with the prayer of their bill, both for a money recovery and for an account of the proceeds of such lands as should be subsequently sold. 4 McCrary, 587. From this decree an appeal was taken to this court.

Mr. Thomas Wilson (with whom was *Mr. Lloyd W. Bowers* on the brief) for appellants.

Mr. C. K. Davis (with whom was *Mr. Owen Morris* on the brief) for appellees.

There is no conflict of testimony on any material point.

The opinion of the Circuit Court disposes of all the assignments of error upon grounds which we insist are unassailable. It is based upon the decision of this court in *Michoud* v. *Girod*, 4 How. 503. That decision settles the law and equity of this case so clearly that there is little necessity for comment, and no necessity for the citation of cumulative authorities.

Mr. Barney should be held to duties and disabilities of an executor in this transaction. He was an executor *de son tort*. 2 Bl. Com. 507; Schouler on Executors, § 184.

Had Mr. Barney attempted to acquire this property in the manner the Girods adopted, as stated in *Michoud* v. *Girod*, at public sale, judicially ordered, the title thus acquired would have been set aside. The method he pursued was more reprehensible. It made him a trustee and imposed upon him the extreme obligation and disabilities prescribed in *Michoud* v. *Girod*. See *Rothwell* v. *Dewees*, 2 Black, 613; *Graffam* v. *Burgess*, 117 U. S. 180, 192.

To the contention that the complainants should have returned the money that they had received before bringing this action, there are several answers. No such ground of defence is assumed by the appellants. They deny entirely the right of the Lathams, and insist that by a perfect and complete transaction, they have in equity parted with all interest in these lands. In case of such a denial of right, a tender is not necessary, but the amount received by the complainants will be taken into account at the hearing and provided for in the

decree; and this was done in this case. *Potter* v. *Taggart*, 54 Wisconsin, 395; *Baumann* v. *Pinckney*, 118 N. Y. 604.

The complainants have not ratified this contract by acquiescing in it, or by any act of confirmation. Their requests of Mr. Barney for a settlement and all of their negotiations with him, futile as they were, were based upon a distinct assertion of the invalidity of the transactions as to the lands.

Mr. Justice Brown delivered the opinion of the court.

This case depends upon the validity of the sale made by the defendant Barney to himself and his associates of the interest of Charles F. Latham in the lands granted in aid of the construction of the Winona and St. Peter Railroad Company, and the binding effect of the releases executed by the plaintiffs and the other heirs of Latham. This sale is attacked upon the ground that it was made by Barney, as trustee for the heirs, to himself and his cocontractors in the construction of the road, and for a grossly inadequate price.

It seems that a few days before the death of Mr. Latham he had an interview with the defendant Barney, in whom he had perfect confidence, and requested him to make a distribution of a part of his property to certain beneficiaries, and to divide the residue among his brothers and sisters and their children. In the early part of 1871, Danford N. Barney, of New York, a member of the syndicate which had constructed the road, and Judge Kelly, of Cleveland, each of whom had married a sister of Latham, met with their wives at Irvington, N.Y., called in the defendant Ashbel H. Barney, and requested him to make a distribution of the estate for the purpose of saving time and expenses. The value of Latham's interest in the land grant was the principal subject of discussion. To quote Barney's own words: "I stated to them that it was very difficult, indeed, to fix an accurate value for that property; there were so many contingencies that might affect its value. They seemed to be very anxious, indeed, as to making a settlement without the intervention of the probate court. . . . They asked me to say what I thought it was worth, not stating the

facts, as I generally understood them at the time. I stated to them that I thought the property ought to be worth $10,000; that if we got all the land that was due to us it would be worth perhaps more than that, but with the uncertainty of getting what we hoped to get that I considered that a fair price for the property, and they all agreed to accept of that, and desired me to make a division of the estate accordingly, which I did." Shortly after this he offered the property to Mr. Sykes, vice-president of the Chicago & Northwestern Railroad, at that price, knowing that he was familiar with the value of the property, but he would not consent to take it. He then offered it to his cocontractors, but they did not at first care to take it. "I said to them it was very important to make this sale, and they said they did not care to have a stranger come in who might not agree with us in the enterprise — might not furnish money for the construction of the road — and various other objections were brought up; and then Mr. Fargo and Mr. Cheney said: 'If you think the property is worth it we will take it.' . . . There was not a man but what objected to taking it at first, except my brother, who knew all about it." With reference to its value, he states as his opinion, and there is nothing in the case to contradict it, "that it could not have been sold to any other party, and I think the interest was taken as a matter of convenience, so as not to bring in any additional new element in the business, and not for any profit out of this particular transaction." There were, it seems, several circumstances which tended materially to impair the value of the land, and in fact to render it at that time unsalable. The Transit Railroad Company, to whose franchise and property the Winona and St. Peter Railroad Company succeeded, had received a loan of the credit of the State to the amount of $500,000 or over, for which it had given its bonds, secured by a mortgage upon its lands and franchises; and it was claimed that these lands were liable for this debt, and at the time of these negotiations this question was pending in the Circuit Court for the District of Minnesota and was subsequently settled in this court. *Hopkins* v. *St. Paul & Pacific Railroad*, 2 Dillon, 396; *Chamberlain* v. *St. Paul & Sioux*

City Railroad, 92 U. S. 299. There were also certain disputes with regard to the title to these lands and to their taxation, which afterwards culminated in a protracted litigation, the pendency of which for a long time seriously impaired the market value of the property.

Acting in pursuance of the authority given at the meeting in Irvington, Barney prepared a form of release and schedule of the assets, which consisted almost entirely of stocks, bonds and coupons, and included the item of $10,000 for the interest in these lands, the assets amounting in all to $187,962.48.

Eleven copies were sent to each of the heirs for their signatures, and were subsequently returned to him, and one copy sent to each with a check for his share of the estate, which was received and retained by each without objection. The copy sent to Edward P. Latham differed from the others in using, instead of the words "Int. in W. & St. P. lands, estimated, $10,000," the words "Interest in W. & St. P. land sales, say $10,000."

So far as Edward P. Latham was concerned, the transaction was closed on January 10, 1872, by Barney sending him his copy of the release and schedule, with a supplementary statement and a draft of $9480.89 to close the account. A similar statement was sent to William H. Latham with a check for $13,993.39. No objection was made to this until August 26, of the same year, when Edward P. Latham wrote Barney briefly, calling his attention to the item of $10,000 for interest in W. & St. P. land sales, and saying that he understood this as the sales made up to that date as made by the company in the usual sales, and by no means the sales of all lands not yet sold; to which Mr. Barney replied, under date of September 11, that Judge Kelly fully understood, when the settlement was made, that it included the payment in full of the heirs' interest in the Winona lands, and that it was fully so stated in the release. "The legislature will, no doubt, this winter order the lands to be opened for taxation. . . . Taxation would make them valueless, almost. . . . There has been no transfer, and I know they" (the purchasers) "don't care for it, and I certainly do not, neither does D. N. We would

both like to sell out, as our interest in the grant is but little value to us except in the good will we may have for our grandchildren." He closed his letter with an offer to surrender to the heirs their entire interest in the lands upon being refunded the $10,000 already divided, and with a request for a decision at once, "as it should not remain an open question." To this Latham replied under date of November 19, saying that, after consultation with some of the heirs, he had decided, with their advice and coöperation, to accept the offer. "You may, therefore," said he, "from this date, consider the $\frac{1}{32}$ part interest" (meaning $\frac{1}{37}$ part) "of the lands in question mine and proceed to make the necessary legal transfer. The money, $10,000, will be ready at an early date." Barney replied under date of November 30, expressing his pleasure that the heirs had concluded to take the interests in the lands to themselves, and saying that it could not be sold to other parties than those now owning $\frac{4}{37}$ of the interest. "Should they buy it they might be charged with misrepresentation should the purchase prove profitable. Should it not prove a good investment for the heirs, none will be able to say that they 'went in blind.'" To this Latham replied, under date of December 26, saying that he supposed the moneys accrued upon sales made since the division and estimate will be deducted from the $10,000; asking the amount to be refunded, and saying that he had it in his hands, and would forward it as soon as the parties could come to an understanding of how and when the transfer should be made. Barney replied, January 2, 1873, that the parties had no title to the lands, the title being in the railroad company, and suggesting that he make a contract for the purchase from each individual heir, and saying that since the division of the estate $1265.38 had been collected. Again he wrote him on January 13, saying that he was not in a position to give him title to any interest in the lands owing to the fact that it was still in the railroad company, and suggesting as follows: "I see no way for you to get an interest in the property other than your legal share, except by contract with each heir, and then file said contract with me, and I will make the distribution of the proceeds of

the sales the same as I do all others holding the original interest." The affair remained in this condition for more than two years, when Barney, being informed that all objections to the sale had been withdrawn, remitted him, under date of April 16, 1875, a final statement with explanations and a check for $298.33 to close the estate. This check was acknowledged and retained, though he declined to give a receipt. No further correspondence passed between these parties, until December of that year.

In the meantime, however, and on January 30, 1873, William H. Latham wrote to Mr. Barney that he had been in communication with his brother Edward; had seen Mr. Barney's last letters to him, and was glad he was willing to give up to him, and such others of the heirs as desired their share of the proceeds of these sales, upon being reimbursed the $10,000 paid, and saying that six, if not more, of the heirs were willing to make this arrangement, and that if he had known anything whatever of these lands he would have been unwilling to sign away his interest for one-ninth of $10,000. This letter was partly, at least, in reply to Mr. Barney's letter to Mr. Edward P. Latham of January 13. To this Barney replied, under date of February 10, protesting that the parties had no title to the lands, and offering to make a distribution of all the money in his hands for lands sold since the date of the final distribution, upon being refunded the $10,000, and offering to continue to make such distribution as long as he continued to be the agent of the party now having an interest in the proceeds of the lands. Again he wrote him under date of April 4, saying that the $10,000 had been promised last December by his brother Edward, and that it was due to the parties that advanced it that it should be at once refunded. Receiving no answer to this, he wrote him again, May 13, to the same effect, saying that there were important suits being threatened, which, if successful, would take from them a portion of the lands, and saying that the purchasers were perfectly willing that the heirs should have their interest returned to them, provided a decision were made, "within say thirty days from this date; but they are not willing to pay for the prop-

erty and have you hold the right at any future time to elect to return the money for the purchase and take the interest. They have now held the matter open for six months." To this Latham replied, May 19, by a somewhat evasive letter, saying that he had been ready to pay his proportion; but, as Barney required the assent of all the heirs before relinquishing the lands as a whole or any portion, he had dismissed the whole thing from his mind as impracticable. He closed by saying that perhaps his brother had acted hastily and injudiciously, and he had written and urged him to immediate decisive action.

On June 19, Mr. Barney wrote again, protesting that none of the parties desired to make a great bargain out of the estate; that the settlement was made to avoid expense; that the time had passed which he had named for the heirs to avail themselves of the privilege of taking their proportion of the lands; but, that there might be no cause for complaint, he would again open the matter for a thirty days' option for one or all of the heirs. "If," says he, "the heirs do not take the interest I am compelled under my agreement to become one of the purchasers; that being the case I wish to rid myself of the ugly position of being a seller and a purchaser. I would not for thrice the value of the property have the ill will of the heirs."

It seems that at this time a controversy had arisen between the Winona and St. Peter Railroad Company and the St. Paul and Sioux City Railroad, which was pending before the Secretary of the Interior, and had been decided alternatively in favor of each party, and was subsequently carried into the courts. There was also a claim pending in favor of one Drake for a three-eighths interest in all the stock, lands and other property of the defendant; and another by one Kirk, who claimed one-fourth of the property, franchises, stock and profits of the defendants, which culminated in a suit in the following October.

The State had also made a claim for taxes upon these lands, and it was then believed that these taxes, if enforced, would render them nearly valueless.

No reply was made to Barney's letter of June 19, 1873, and all correspondence between these parties with respect to these lands ceased for a time, although during the year 1874 a number of friendly letters were exchanged between W. H. Latham and himself with reference to some United States Express stock, but no allusion was made to the lands. On February 15, 1875, Mr. Barney remitted William H. Latham a statement and check for $298.34 due him as heir of the estate.

On March 27 Latham reopened the correspondence by stating his reluctance to give up his interest in the lands, having never been fully informed as to their status, and desiring to know how many acres they were entitled to, and how many had been sold, etc. To this Mr. Barney replied, calling his attention to the offer he had made, and asking him if he were not satisfied, to let him know what he desired, and saying that the Drake suit would be tried in June, and that the tax suits would probably be decided against them. On April 26 he wrote him a very full letter, saying that he had given the heirs the option to take their proportion of the proceeds of the land, and three times extended this option, and continued the same until September, 1873, "when my brother said he had talked with you about it, and you were satisfied," and giving considerable information with regard to the number of acres claimed by them, the number sold, and probabilities with respect to the pending suits, etc. To this Mr. Latham replied in a short note, April 29, acknowledging receipt of a statement and check enclosed in his letter, and saying that the whole matter appeared satisfactory as far as a cursory examination would indicate. "I am obliged to you for the evident effort made to satisfy me and will write more fully in a few days." On the same day Mr. Barney wrote him from New York, saying that the decision of the full bench on the question of taxation had been adverse; that the suit had been promoted by his brother, and that $40,000 a year would not pay their taxes.

No other correspondence took place until December 17, 1875, when the plaintiffs wrote a joint letter, saying that each of them would pay one-ninth of the $10,000, "paid by yourself,

directly or indirectly, for proceeds of sales of lands made since January 1, 1872, or for receipts of sales made anterior to that date." Owing apparently to the pressure of business engagements, Barney did not reply to this until March 1, 1876, wherein he rehearsed at length what had been done, and protested that it would not be fair, after having taken all the risk of making the property valuable, for the plaintiffs to demand their proportion back again, "now that we have been in the main successful." He closed by declining to comply with their request for the two-ninths interest in the lands. In reply, Mr. Latham wrote him, March 23, a long letter stating his reasons why he should not be bound by what had been done, and renewing his proposal to take his interest and pay the corresponding proportion of the $10,000. This letter is certainly a very cogent statement of the position from his standpoint. To this and another letter, not produced, Barney replied under date of April 24, presenting also a full statement of facts, urging the injustice of his claim, and offering still to give him and his brother two-ninths of one thirty-seventh interest in the Winona and St. Peter Land Company, formed by the former associates, who took the same proportional interests in the new company they held before it was organized, for two-ninths of $10,000. (This company was organized in 1876 by the defendant Barney and his associates, and had taken the title to all these lands from the railroad company.) This offer was declined by Mr. Latham, and the correspondence was closed by a letter of Mr. Barney, August 1, 1876, saying that he would have transferred to the plaintiffs one-ninth of one thirty-seventh of the stock of the new land company, carrying dividends from its organization for all receipts for lands sold and to be sold since its organization. "The difference between what you ask and my offer would not pay the lawyers' fees for prosecuting or defending a suit brought to seek what you ask for."

This entire correspondence, which is very voluminous, was characterized by the most courteous language; with an evident desire on the part of each to take no unfair advantage of the other, but with a failure to agree upon what, under the

circumstances, justice and equity demanded. It really constitutes in itself nearly all the facts pertinent to the case. It certainly exhibits on the part of Mr. Barney a desire to deal fairly with the plaintiffs, and a vacillation on their part, which has a strong tendency to show that before making up their minds to accept his offer to refund the $10,000, and take the proceeds of the sales of the lands, they intended to wait and see whether it would prove a successful speculation. We have no desire to weaken or qualify in any way the wholesome doctrine laid down by this court in the case of *Michoud* v. *Girod*, 4 How. 503, that a trustee cannot legally purchase on his own account that which his duty requires him to sell on account of another, nor purchase on account of another that which he sells upon his own account — in other words, he cannot unite the two opposite characters of buyer and seller. So jealous is the law of dealings of this character by persons holding confidential relations to each other, that the *cestui que trust* may avoid the transaction, even though the sale was without fraud, the property sold for its full value, and no actual injury to his interests be proven. It does not follow, however, that the sale is absolutely void in the sense that the purchaser takes no title, which he can convey to a third person — a *bona fide* purchaser without notice; nor that the *cestui que trust* may not, upon notice of all the facts, ratify and affirm the sale by his acquiescence or silent approval. Thus in *Marsh* v. *Whitmore*, 21 Wall. 178, 183, 184, where an attorney sold bonds of a client at a public sale, and bought them in himself, at their full value at the time, and the client was aware of the purchase and acquiesced in it for twelve years, it was held to be too late for him to attempt to impeach the validity of the sale. "Most undoubtedly," said the court, "that sale was voidable. The character of vendor and that of purchaser cannot be held by the same person. They impose different obligations. Their union in the same person would at once raise a conflict between interest and duty, and, constituted as humanity is, in the majority of cases duty would be overborne in the struggle. . . . The complainant could have treated the purchase made by the defendant as a

nullity. . . . But unfortunately for him there is more in the case. He has adopted and approved of the transaction. . . . Had he at once denied the validity of the transaction, or by any declaration or proceeding indicated dissatisfaction with it, or even refrained from expressions of approval, he would have stood in a court of equity in a very different position."

So in *Twin Lick Oil Company* v. *Marbury*, 91 U. S. 587, it is said that the right of a corporation to avoid the sale of its property by reason of the fiduciary relations of the purchaser must be exercised within a reasonable time after the facts connected therewith are made known, or can by due diligence be ascertained, and that the determination of what is such reasonable time must be arrived at by a consideration of all the elements which affect that question.

In *Hayward* v. *National Bank*, 96 U. S. 611, a bank sold collaterals to three of its own directors, and applied the proceeds to the payment of a loan. The debtor, who was advised of the sale, and that enough had been realized to pay his indebtedness, made no objection; but nearly four years after the sale, the stocks having in the meantime greatly increased in value, notified the bank of his desire and purpose to redeem them; but on his subsequently filing a bill for that purpose, he was held not entitled to relief. To the same effect are *Grymes* v. *Sanders*, 93 U. S. 55, 62; *Pence* v. *Langdon*, 99 U. S. 578, 581; *Mackall* v. *Casilear*, 137 U. S. 556, 566. In cases of actual fraud or of want of knowledge of the facts, the law is very tolerant of delay; but where the circumstances of the case negative this idea, and the transaction is sought to be impeached only by reason of the confidential relations between the parties, and the *cestuis que trust* have ample notice of the facts, they ought not to wait and make their action in setting aside the sale dependent upon the question whether it is likely to prove a profitable speculation. As the question whether the sale should be vacated or not depends upon the facts as they existed at the time of the sale, so in taking proceedings to avoid such sale, the plaintiff should act upon his information as to such facts, and not delay for the purpose of ascer-

taining whether he is likely to be benefited by a rise in the property, since that would practically amount to throwing upon the purchaser any losses he might sustain by a fall, and denying him the benefit of a possible rise. *Hammond* v. *Hopkins*, *ante*, 224.

This is not an ordinary case of a trustee buying the property of his *cestui que trust* for the purpose of gain. The deceased was associated with eight others in the construction of a railroad; they were to be paid in part, at least, by these lands or their proceeds. At Latham's death he left a large amount of property, of which his interest in these lands was but a small fraction, estimated at about one-eighteenth. At his request and that of two of the heirs, the defendant Barney undertook the settlement of the estate for the purpose of saving the expense of administration. Had Latham been alive and desirous of disposing of his interest in these lands, his first thought would have been to offer such interest to his associates, who, already owning thirty-six thirty-sevenths, could well afford to buy this trifling interest, and, naturally desiring to prevent a stranger from entering the syndicate, would be likely to pay as much or more for it than any one else. Failing to find a purchaser in Mr. Sykes, Barney offered it to the syndicate. He could not himself have expected to realize much by the transaction, since his interest was only an eighth of the whole purchase, which was itself only one thirty-seventh of the entire grant. There was no attempt on his part to conceal the real transaction, or to disguise the fact that he was one of the purchasers. By making the sale he was enabled to effect a distribution of the estate without delay. This he proceeded to do by sending to each heir a statement of his account and a check for his or her share of the proceeds, demanding at the same time a release from further liability.

Apparently so little was thought of this interest in the lands that the release itself spoke only of "personal property, to be divided among his next of kin, . . . whether in money, bonds, stock or other property." In short, his interest in these lands was treated as a mere incident to the personal estate, and unworthy of a separate consideration. It was

thought, and properly so, that it should be disposed of at once in order to secure a speedy settlement of the estate; if put up at auction, it would probably have proven unsalable.

There is absolutely nothing tending to show fraud or bad faith on the part of the defendant Barney; indeed, we are not satisfied that this not was the most prudent disposition to make of this interest, in view of the uncertainty regarding the title and value of this property. While the law pronounces a sale of this kind voidable at the election of the *cestui qui trust*, there was every reason for demanding prompt action upon their part in disaffirming it. Barney himself recognized the right of the plaintiffs to set aside the sale; gave them apparently a satisfactory statement of the facts, requesting only that a decision should be made at once, as it should not remain an open question. (September 11, 1872.) Nothing decisive having been done, he wrote W. H. Latham again, May 13, 1873, giving him the option of rescinding the sale if action were taken within thirty days, which was again extended by his letter of June 19. Nothing was done for nearly two years, when Latham reopened the correspondence by asking further particulars. Another correspondence of a year then ensued, the property in the meantime apparently having come into the market and largely increased in value. In view of the lapse of time, the organization of a new company and the change of circumstances, Mr. Barney was apparently unwilling to renew his first proposition, but submitted a new one, or rather a modification of the first, which the plaintiffs declined to consider, and in December, 1876, filed this bill. In the meantime Danford N. Barney and Judge Kelly, the two most material witnesses, who acted for the other heirs and advised the sale, have both died, and the parties have lost the benefit of their testimony.

Under the circumstances, we think the plaintiffs should have taken immediate action; they were fully informed of the facts of the transaction, or at least they were informed of enough to put upon them the necessity for further inquiry, and they must have known that delay, even for a year or two, might work a very great change in the value of their brother's

interest. If the syndicate were successful in their litigation with respect to these lands, they would undoubtedly largely increase in value; upon the other hand, if they were unsuccessful, the interest might be comparatively worthless. No explanation is given for their delay, and none is suggested except an apparent intention to wait and see what the value of these lands was likely to become, and whether it would prove more profitable to set aside the sale or let it stand. While the delay in this case was not a long one, measured simply by the time which elapsed after the sale was made, we think, under the circumstances, it amounted to a ratification of such sale, and that the bill should have been dismissed.

The decree of the court below is therefore

Reversed, and the case remanded with directions to dismiss the bill with costs.

MR. JUSTICE FIELD dissented.

MR. JUSTICE BREWER did not sit upon the argument of this case, and took no part in its decision.

HORNER *v.* UNITED STATES. No. 2.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 1473. Argued January 13, 14, 1892. — Decided March 7, 1892.

On a complaint before a United States commissioner in New York, against H. for a criminal offence, in violation of § 3894 of the Revised Statutes, as amended by the act of September 19, 1890, c. 908, (26 Stat. 465,) prohibiting the sending by mail of circulars concerning lotteries, H. was committed to await the action of the grand jury. A writ of *habeas corpus* issued by the Circuit Court of the United States was dismissed by that court. H. appealed to this court in November, 1891. *Held,*

(1) As the constitutionality of § 3894, as amended, was drawn in question, an appeal lay directly to this court from the Circuit Court, under § 5 of the act of March 3, 1891, c. 517, (26 Stat. 826 to 828, 1115;)

(2) Under such an appeal, this court acquires jurisdiction of the entire case, and of all questions involved in it, and not merely of the question of constitutionality;
(3) This court ought not to review the question whether the transaction complained of was an offence against the statute, because the commissioner had jurisdiction of the subject matter involved, and of the person of H.;
(4) The statute is constitutional;
(5) A statute is a law equally with a treaty, and, if subsequent to and conflicting with the treaty, supersedes the latter.

THE case is stated in the opinion.

Mr. Alfred Taylor and *Mr. Herman Aaron* for appellant.

Mr. Solicitor General for appellee.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

On the 10th of August, 1891, a post-office inspector of the United States made complaint on oath before John A. Shields, a United States commissioner for the Southern District of New York, that, on the 29th of December, 1890, Edward H. Horner, of New York City, unlawfully deposited, and caused to be deposited in the post-office at that city, in the State of New York, and in the Southern District of New York, a certain circular, to be conveyed and delivered by mail, which, in the contents thereof, thereafter set forth in the complaint, concerned a lottery, and which was then and there addressed to Joseph Ehrman, 70 Dearborn Street, Chicago, Illinois, and was enclosed in an envelope, with postage thereon prepaid, and carried by mail, and that the circular contained, among other things, what is set forth in the margin,[1] the further contents of the complaint being also set forth therewith.

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[1] "'538.

"'Banking-house of E. H. Horner, No. 88 Wall street.

"'NEW YORK, *December* 27, 1890.

"'Austrian State Bonds of 1864.

"'110th redemption, December 1st, 1890, at Wien. The following 26 series were called in:

On the same day the commissioner issued a warrant to the marshal, commanding him to arrest Horner and bring him before the commissioner. This was done, and Horner demanded an examination on the charge, which was had and completed; and the commissioner then certified that it appeared to him, from the testimony offered, that there was probable cause to believe Horner guilty of the offence charged in the warrant, and he committed Horner to the custody of the marshal, in default of $5000 bail, to await the action of the grand jury. By consent, Horner was then discharged, on his own recognizance, until a day named, for the purpose of giving bail, and was subsequently discharged on bail, to await trial.

"Serie.	No.	Fl. S. W.	Serie.	No.	Fl. S. W.	Serie.	No.	Fl. S. W.
"121	36	20000	1369	24	24 400	2666	63	400
"271	75	400		46	400		84	400
"280	22	1000	1792	19	400	2988	2	400
"	65	400	1970	16	2 000		10	400
"461	37	400		69	400		48	50000
"481	54	400		70	5,000		88	400
	72	10000	2388	28	400	3195	44	5000
"487	69	400	2412	53	400		50	400
"493	6	400		74	400	3238	14	400
"684	14	400		82	400		52	400
	56	400	2483	36	400	3486	35	400
	94	400	2526	72	400	3685	39	400
"815	70	400		82	400		81	400
	82	400	2531	44	400	3969	4	400
"853	23	400		91	1000		14	400
	61	400	2666	3	400		50	400
	81	400		18	2000			

"'All other bonds contained in the above twenty-six series not especially mentioned therein are redeemed with fl. 200. Payment on and after March 1, 1891. The next report of redemption will be published in the second half of the month of January, 1891. Customers who have been notified by special letter of the redemption of their bonds can cash the respective amounts at my office.'

"That the said words and figures of the said circular relate to and concern, and were understood by Joseph Ehrman to relate to and concern, certain so-called bonds issued by the Empire of Austria, and to state on which of said so-called bonds payments were to be made and the amount thereof.

On the 17th of November, 1891, Horner was surrendered by his surety, and was committed by the commissioner, in

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"The following is a translation of the face of one of such so-called bonds:

"'Series 921. 100 florins. Number 60.

"'Premium Bonds.

"'One hundred florins, Austrian standard, as share of the loan of forty million florins, Austrian standard, made according to the law of November 17th, 1863, (Law Journal of the Empire, No. 98,) for which the amount resulting, according to the plan of redemption, will be paid to the bearer by the universal state loan treasury.

"'Vienna, February 11th, 1864.

"'(Signed) JOSEPH RUDDE,

"'(Coat of arms.) *Imperial-Royal Minister Counsellor.*

"'(Signed) PLENER,

"'*Imperial-Royal Minister of Justice.*

"'For the board for controlling the state loans:

"'(Signed) COLLERDO MANNSFELDT.

"'(Signed) WINTERSTEIN.

"'For the imperial-royal universal state loan treasury:

"'(Signed) WINTER.

"'(Signed) SCHIMKOWSKY.'

"Each of the so-called bonds has upon its face a series number and a number in the series. The amount of indebtedness which said so-called bond purports to evidence is one hundred (100) florins. The plan of drawing set forth on the back of said so-called bond shows that up to April, 1874, there were to take place five drawings a year, on dates therein stated, which should determine upon which of the so-called bonds payments should be made and the amounts of such payments. That thereafter and until the end of the nineteenth (19th) year after the date of the issue of the so-called bonds, four drawings per year were to take place at stated dates for the same purpose; and that thereafter, to and including the thirty-first (31st) year, three (3) drawings were to take place at fixed dates for each year for the same purpose; and that thereafter, to and including the fifty-fifth (55th) year after the date of issue of such so-called bonds, two (2) drawings per year were to take place for the same purpose; at the end of which time all of said so-called bonds were, according to the plan aforesaid, to be paid; that according to said plan the smallest amount to be paid for any of such so-called bonds selected for payment during the first year after issue was one hundred and thirty-five (135) gulden, during the second year one hundred and forty (140) gulden, and during the third year one hundred and forty-five (145) gulden, and so on, increasing in amount five (5) gulden each year until the amount should reach two hundred (200) gulden, which amount then remained fixed as the minimum sum to be paid for any of the so-called

default of $5000 bail, to the custody of the marshal on the warrant, to await the action of the grand jury. On the same

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bonds whose payment should be determined by the drawings aforesaid; that gulden and florins are denominations of money of the same value; that under the said plan other larger amounts are provided to be paid on certain of the so-called bonds, to be determined by the drawing. Thus, during the first year the following sums are, according to said plan, to be paid on certain so-called bonds, to be determined by such drawing, to wit:

"On one bond	250,000	gulden
" " " "	25,000	"
" " " "	15,000	"
" " " "	10,000	"
"On 2 bonds, each at 5,000 gulden	10,000	"
"On 3 bonds, each at 2,000 gulden	6,000	"
"On 6 bonds, each at 1,000 gulden	6,000	"
"On 15 bonds, each at 500 gulden	7,500	"
"On 30 bonds, each at 400 gulden	12,000	"

"And during subsequent periods other provision is made for such larger amounts. That all of the said so-called bonds are in the same form as said copy translation, and have the same drawing and redemption plan endorsed upon them, and are identical in all respects, except that the series numbers and the number thereof vary as to each so-called bond; that deponent produces herewith the original of the so-called bond herein referred to; that all the drawings heretofore referred to by which, first, are determined the series of the so-called bonds to be paid or redeemed in each year, and, second, are determined the particular bonds in the series whose holders shall be entitled to the larger sums aforesaid, the numbers of which are drawn from the wheel, are conducted in such a way as that the determination of the numbers both for redemption and for amounts is wholly by lot or chance. The holder of each so-called bond has an equal chance with the holder of every other so-called bond, first, in securing an early payment of his so-called bond, and, second, in securing, as a so-called payment for his so-called bond, the very large prizes to which reference has already been made, the result in each case, as before alleged, being dependent wholly on lot or chance.

"Wherefore deponent says that the scheme for the so-called redemption of the so-called bonds above referred to is a lottery, and that the depositing of the said circular and the causing thereof to be deposited as above alleged was against the peace and dignity of the United States of America, and contrary to and in violation of section three thousand eight hundred and ninety-four (3894). of the Revised Statutes of the United States, as amended by the act of September nineteenth (19th), one thousand eight hundred and ninety (1890)."

day, on the petition of Horner, presented to the Circuit Court of the United States for the Southern District of New York, an order was made by that court that writs of *habeas corpus* and *certiorari* issue to the marshal and the commissioner, returnable on that day. Returns were made to the writs, and on the same day, after counsel were heard, the court, held by Judge Wheeler, made an order dismissing the writ of *habeas corpus* and remanding Horner to the custody of the marshal. Horner thereupon took an appeal to this court, on November 17, 1891, and was discharged on bail to abide the further action of the Circuit Court on the mandate of this court.

The complaint in this case is founded on § 3894 of the Revised Statutes of the United States, as amended by the act of September 19, 1890, c. 908, (26 Stat. 465,) which reads as follows: "No letter, postal card or circular concerning any lottery, so-called gift concert or other similar enterprise offering prizes dependent upon lot or chance, or concerning schemes devised for the purpose of obtaining money or property under false pretences, and no list of the drawings at any lottery or similar scheme, and no lottery ticket or part thereof, and no check, draft, bill, money, postal note or money order for the purchase of any ticket, tickets, or part thereof, or of any share or any chance in any such lottery or gift enterprise, shall be carried in the mail or delivered at or through any post-office or branch thereof, or by any letter carrier; nor shall any newspaper, circular, pamphlet or publication of any kind containing any advertisement of any lottery or gift enterprise of any kind offering prizes dependent upon lot or chance, or containing any list of prizes awarded at the drawings of any such lottery or gift enterprise, whether said list is of any part or of all of the drawing, be carried in the mail or delivered by any postmaster or letter carrier. Any person who shall knowingly deposit or cause to be deposited, or who shall knowingly send or cause to be sent, anything to be conveyed or delivered by mail in violation of this section, or who shall knowingly cause to be delivered by mail anything herein forbidden to be carried by mail, shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine of not more than five

hundred dollars or by imprisonment for not more than one year, or by both such fine and imprisonment for each offence. Any person violating any of the provisions of this section may be proceeded against by information or indictment and tried and punished, either in the district at which the unlawful publication was mailed or to which it is carried by mail for delivery according to the direction thereon, or at which it is caused to be delivered by mail to the person to whom it is addressed."

There are 9 assignments of error in this case, 6 of which allege that the facts proved before the commissioner do not constitute a crime within § 3894, as amended; 2 of them are based on the claim that that section is unconstitutional; and the remaining one contends that that section is in violation of a treaty between the United States and Austria, and is therefore void.

It is contended on the part of the United States that, as the appeal in this case was taken on November 17, 1891, after the act entitled "An act to establish circuit courts of appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," c. 517, passed March 3, 1891, (26 Stat. 826,) went into effect, this court has no jurisdiction of this appeal, and that it ought to have been taken to the Circuit Court of Appeals for the Second Circuit. But, as the constitutionality of § 3894, as amended, is drawn in question, an appeal in this case lies directly to this court from the Circuit Court, under § 5 of the act of March 3, 1891, which gives such appeal "in any case in which the constitutionality of any law of the United States . . . is drawn in question." This is in accordance with our decision in *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 658, 659, where it was said: "As this case involves the constitutionality of a law of the United States, it is within the appellate jurisdiction of this court, notwithstanding the appeal was taken since the act establishing Circuit Courts of Appeals took effect. Act of March 3, 1891, c. 517, § 5; 26 Stat. 827, 828, 1115."

We are further of opinion that where an appeal or writ of error is taken direct to this court under § 5 of the act of March 3, 1891, in a case in which the constitutionality of a law of the

United States is drawn in question, this court acquires jurisdiction of the entire case, and of all questions involved in it, and not merely of the question of the constitutionality of the law of the United States. This is shown by the fact that, under sec. 5, where an appeal or writ of error is taken direct to this court, in a case in which the jurisdiction of the District Court or of the Circuit Court is in issue, it is specifically directed that "the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision," but there is no kindred limitation prescribed in regard to any of the other cases in which jurisdiction in this court of appeals or writs of error is given by § 5.

It is contended for Horner that the circular set forth in the complaint, relating to the redemption of the Austrian government bonds, is not included in the prohibition of § 3894 of the Revised Statutes, as amended, and that he committed no offence by depositing such circular in the mail. But we are of opinion that that question ought not to be reviewed by us on this appeal. The point raised is that the Austrian bond scheme was not a lottery. That is a question properly triable by the court in which an indictment may be found against Horner. He is now held to await the action of a grand jury. His case is in the regular course of criminal adjudication. It is not proper for this court, on this appeal, nor was it proper for the Circuit Court, on the writ of *habeas corpus*, to determine the question as to whether the scheme was a lottery. *In re Cortes*, 136 U. S. 330; *Stevens* v. *Fuller*, 136 U. S. 468. The commissioner had jurisdiction of the subject matter involved and of the person of Horner, and the grand jury would have like jurisdiction. The offence, if any, was committed within the Southern District of New York. Whether the scheme was a lottery is a question to be determined in the administration of the jurisdiction. It is not for this court to determine that question in advance. The principle is the same as that involved in *In re Fassett*, 142 U. S. 479, 483, 484. The case presents for the determination of the court in which the indictment may be found the question as to whether the scheme was a lottery, and it is not for any court to determine it in

advance, on *habeas corpus*. If an inferior court or magistrate of the United States has jurisdiction, a superior court of the United States will not interfere by *habeas corpus*. *Ex parte Mason*, 105 U. S. 696; *Ex parte Carll*, 106 U. S. 521; *Ex parte Wilson*, 114 U. S. 417; *Wales* v. *Whitney*, 114 U. S. 564; *Ex parte Harding*, 120 U. S. 782; *Benson* v. *McMahon*, 127 U. S. 457; *In re Coy*, 127 U. S. 731, 758; *In re Cortes*, 136 U. S. 330; *Stevens* v. *Fuller*, 136 U. S. 468, 477, 478 and cases there cited.

The question of the constitutionality of § 3894, as amended, is disposed of by the decision of this court in *Ex parte Rapier*, *ante*, 110, which holds that it is constitutional.

The proposition that that section is void if it contravenes a treaty between the United States and Austria is not tenable. The statute is a law equally with the treaty, and, if subsequent and conflicting with the treaty, supersedes the latter. *Head-Money Cases*, 112 U. S. 580; *Whitney* v. *Robertson*, 124 U. S. 190; *Chinese Exclusion Case*, 130 U. S. 581.

The order of the Circuit Court, dismissing the writ of *habeas corpus* and remanding the accused, is

Affirmed.

DUNWOODY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 156. Argued January 14, 15, 1892. — Decided January 26, 1892.

The National Board of Health had no authority to incur any liability upon the part of the government for salaries or other expenses in excess of the amounts appropriated by Congress for such purposes; and the plaintiff in error did not perform services as a member of that board, or as its chief clerk, or its secretary, or as a disbursing agent of the Treasury Department under any implied contract that he should be compensated otherwise than out of the moneys specifically appropriated to meet the expenses incurred by the board in the performance of the duties imposed upon it.

United States v. *Langston*, 118 U. S. 389, distinguished from this case.

Statement of the Case.

THE court stated the case as follows:

March 3, 1879. An act was passed by Congress to prevent the introduction of contagious diseases into the United States, and establishing the National Board of Health, to consist of seven members, to be appointed by the President, by and with the advice and consent of the Senate, "whose compensation, during the time when actually engaged in the performance of their duties under this act, shall be ten dollars per diem each and reasonable expenses;" four members of the board to be detailed from the Army, Navy, Marine Hospital Service, and the Department of Justice, respectively, and to receive no compensation. The sum of $50,000 was appropriated "to pay the salaries and expenses" of the board, and "to carry out the purposes" of the act. 20 Stat. 484, c. 202.

April 5, 1879. The appellant Dunwoody was appointed by the board its chief clerk, with compensation at the rate of $100 per month, dating from April 3, 1879.

June 2, 1879. Congress passed an act to prevent the introduction of contagious or infectious diseases into the United States, requiring the National Board of Health to coöperate with, and, so far as it lawfully might, aid state and municipal boards of health to that end. The act appropriated $500,000, or so much thereof as might be necessary, to meet the expenses incurred in carrying out its provisions, and to be disbursed by the Secretary of the Treasury on estimates made by the National Board of Health, and approved by him. This act was to continue in force four years. 21 Stat. 5, 8, c. 11.

June 5, 1879. Dunwoody was nominated by the board to the Secretary of the Treasury as its disbursing clerk.

June 6, 1879. The Secretary sent to Dunwoody this communication: "Upon the recommendation of the National Board of Health, you are hereby appointed a disbursing agent of this department for the purpose of disbursing the funds appropriated by Congress for the National Board of Health — this appointment to be without compensation. You will be required to furnish a bond, with two or more sureties, in the penal sum of $20,000." The bond so required was given.

June 12, 1879. The board fixed the salary of the claimant as chief clerk at $2000 per annum, beginning June 1.

July 1, 1879. An act was passed authorizing the board to procure suitable offices for the transaction of its business, at a rent not exceeding $1800 a year, and to pay past rent, and providing: "§ 5. That the chief clerk of the National Board of Health shall act as disbursing agent for the board, and shall give bond, conformably to § 176 of the Revised Statutes, for the faithful performance of that duty, and for such service he shall receive $300 per annum, in addition to his salary as chief clerk, and the Board of Health may, with the approval of the Secretary of the Treasury, pay to its secretary such sum, in addition to his pay as a member of the board, as it may deem proper, not exceeding $100 per month." "§ 7. That all the money hereinbefore authorized to be expended and all contracts made and liabilities incurred by the National Board of Health shall be paid out of the appropriation of five hundred thousand dollars made in the act of Congress . . . approved June second, eighteeen hundred and seventy-nine." 21 Stat. 46, c. 61.

June 16, 1880. The act appropriating money for sundry civil expenses of the government for the fiscal year ending June 30, 1881, contained these items:

"National Board of Health: For salaries and expenses of the National Board of Health, and to carry out the purposes of the various acts creating the National Board of Health, seventy-five thousand dollars, or so much thereof as is necessary: *Provided*, That twenty-five thousand dollars of the appropriation made by the act of June second, eighteen hundred and seventy-nine, . . shall be applied to the same purposes.

"For aid to local quarantine stations and for aid to local and state boards of health, to be used in case of epidemic, one hundred thousand dollars; *Provided*, That fifty thousand dollars of the appropriation made by act of June second, eighteen hundred and seventy-nine, . . . shall be applied to the same purposes." 21 Stat. 266, c. 235.

February 8, 1881. Dunwoody's salary as chief clerk was increased to $3000 per annum.

Statement of the Case.

March 3, 1881. The appropriation act for sundry civil expenses for the fiscal year ending June 30, 1882, contained these items:

"National Board of Health: For salaries and expenses of the National Board of Health, and to carry out the purposes of the various acts creating the National Board of Health, seventy-five thousand dollars, or so much thereof as is necessary: *Provided*, That fifty thousand dollars of the appropriation made by act of June second, eighteen hundred and seventy-nine, . . . shall be applied to the same purposes; *and no more money shall be expended for the above purposes out of any appropriations heretofore made or by virtue of any previous law.*

"For aid to local quarantine stations and for aid to local and state boards of health, to be used in case of epidemic, one hundred thousand dollars: *Provided*, That fifty thousand dollars of the appropriation made by act of June second, eighteen hundred and seventy-nine, . . . shall be applied to the same purposes, and *no money shall be expended for the above service* for the fiscal year eighteen hundred and eighty-one *other than that specifically appropriated by the act approved June* 16, 1880, making appropriations for sundry civil expenses of the government." 21 Stat. 442–3, c. 133.

August 7, 1882. The Sundry Civil Appropriation Act for the fiscal year ending June 30, 1883, contained these items:

"For salaries and expenses of the National Board of Health as follows:

"For pay and expenses of the members of the National Board of Health, ten thousand dollars.

"For pay of secretary and disbursing agent, and pay of clerks, messengers, and laborers, five thousand five hundred dollars.

"For rent, light, fuel, furniture, stationery, telegrams and postage, two thousand dollars.

"For miscellaneous expenses, five hundred dollars.

"And the President of the United States is hereby authorized, in case of a threatened or actual epidemic, to use a sum not exceeding one hundred thousand dollars, out of any money

in the Treasury not otherwise appropriated, in aid of State and local boards or otherwise, in his discretion, in preventing and suppressing the spread of the same.

"For aid to State and local boards of health and to local quarantine stations in carrying out their rules and regulations to prevent the introduction and spread of contagious and infectious diseases in the United States, fifty thousand dollars: *Provided*, That *no other public money than that hereby appropriated shall be expended for the purposes of the Board of Health: and provided further*, That hereafter the duties and investigations of the board of health shall be confined to the diseases of cholera, small-pox, and yellow fever." 22 Stat. 302, 315, c. 433.

March 3, 1883. The Sundry Civil Appropriation Act for the fiscal year ending June 30, 1884, contained these items:

"For the National Board of Health. For compensation and personal expenses of members of the board, ten thousand dollars.

"The President of the United States is hereby authorized, in case of a threatened or actual epidemic, to use a sum, not exceeding one hundred thousand dollars, out of any money in the Treasury not otherwise appropriated, in aid of State and local boards or otherwise, in his discretion, in preventing and suppressing the spread of the same and maintaining quarantine at points of danger." 22 Stat. 603, 613, c. 143.

October 20, 1884. During the recess of the Senate the President appointed Dunwoody, from civil life, a member of the National Board of Health, and on the 4th of December of the same year, appointed him to that position by and with the advice and consent of the Senate. Immediately upon his appointment as a member of the board he was designated by it as its secretary. An order was made by the board — on what day it does not appear — appointing him its secretary, with the approval of the Secretary of the Treasury, (which order was not revoked,) with pay at the rate of $100 per month, in addition to his pay as a member of the board. He continued to be secretary and performed duty as such from November, 1884, to the filing of the petition herein, August 18, 1886. He has received no compensation as secretary.

Statement of the Case.

March 3, 1885. The Sundry Civil Appropriation Act supplying deficiencies for the fiscal year ending June 30, 1885, and for prior years, contained these items:

"National Board of Health. For salary of the secretary of the Board from April first, eighteen hundred and eighty-four to March first, eighteen hundred and eighty-five, three thousand one hundred and thirty dollars.

"For pay of messenger from July first, eighteen hundred and eighty-four to March first, eighteen hundred and eighty-five, three hundred dollars.

"For rent of building from July first, eighteen hundred and eighty-four to March thirty-first, eighteen hundred and eighty-five, nine hundred dollars." 23 Stat. 446, 452, c. 359.

March 3, 1885. The Sundry Civil Appropriation Act for the fiscal year ending June 30, 1886, contained these items:

"National Board of Health: For salaries and expenses of the National Board of Health, five thousand dollars.

"For suppression of epidemic diseases: The President of the United States is hereby authorized, in case of threatened or actual epidemic of cholera or yellow fever, to use the unexpended balance of the sum reappropriated therefor by the act approved July seventh, eighteen hundred and eighty-four, together with the further sum of three hundred thousand dollars, the same to be immediately available, in aid of State and local boards or otherwise, in his discretion, in preventing and suppressing the spread of the same and for maintaining quarantine and maritime inspections at points of danger." 23 Stat. 478, 496, c. 360.

August 4, 1886. An act to supply deficiencies in appropriations for the fiscal year ending June 30, 1886, contained this item:

"For salaries and expenses of National Board of Health, sixty dollars." 24 Stat. 256, 289, c. 903.

March 2, 1889. An act supplying deficiencies in appropriations for the fiscal year ending June 30, 1889, and for prior years and for other objects, contained this item:

"National Board of Health: To pay for transportation and storage of books, records and furniture of the National Board

of Health from September first, eighteen hundred and eighty-six, to March fourth, eighteen hundred and eighty-nine, and the transportation of the same to the office of the Surgeon-General of the Army, where they shall be hereafter stored, one thousand and four dollars." 25 Stat. 905, 912, c. 410.

Dunwoody received no compensation from the United States either as chief clerk or disbursing agent after July 1, 1883, nor as member of the board from March 1, 1885, to and including June 30, 1885, or from May 12, 1886, to June 30, 1886.

There was no meeting of the National Board of Health after November, 1884, but plaintiff went "regularly to the office of the board and attended to his duties as secretary."

The appellant brought this action to recover from the United States $4442.77, as compensation for his services as chief clerk and disbursing agent from July 1, 1883, to November 5, 1884; $1710 for services as member of the board from March 1, 1885, to June 30, 1885, and from May 12, 1886, to June 30, 1886; and $2090 for services as secretary of the board from November 5, 1884, to July 31, 1886; in all, $8242.77.

The United States, besides controverting the claims of the appellant, asked judgment, by way of counter-claim, for $11,391.21, which sum, it was alleged, he had illegally appropriated to his own use, out of moneys set apart by Congress for the expenses of the National Board of Health, and not intended by it to be used in payment of any salary or personal compensation.

The court of claims dismissed both the petition and counter-claim. 22 C. Cl. 269, 277; 23 C. Cl. 82.

Mr. George A. King for appellant.

Mr. Assistant Attorney General Cotton for appellee.

Mr. Justice Harlan delivered the opinion of the court.

The United States has not appealed from the judgment below, and, therefore, we need not consider any question raised by its counter-claim.

Does this case come within the principle announced in *United States* v. *Langston*, 118 U. S. 389, 394? Langston was Minister Resident and Consul General of the United States at the Republic of Hayti from September 28, 1877, until July 24, 1885, under a statute providing for a diplomatic representative of the United States to the Republic of Hayti, at an annual salary of $7500. That amount was annually appropriated for the salary of that officer from the creation of the office until 1883. But the Diplomatic and Consular Appropriation acts for the fiscal years ending June 30, 1883, 1884 and 1885 appropriated only $5000 for the minister at Hayti. And the question was whether Langston was entitled to $7500 for each of the fiscal years last named. This court said: "While the case is not free from difficulty, the court is of opinion that, according to the settled rules of interpretation, a statute fixing the annual salary of a public officer at a named sum, without limitation as to time, should not be deemed abrogated or suspended by subsequent enactments which merely appropriated a less amount for the services of that officer for particular fiscal years, and which contained no words that expressly, or by clear implication, modified or repealed the previous law."

We do not think the present case comes within the principle of Langston's case. While the act of 1879, establishing the National Board of Health, may be said to have created the office of member of that board, with a fixed salary, and without express limitation as to time, the accompanying appropriation of a round sum to pay "the salaries and expenses" of the board and to "carry out the purposes" of the act, indicates that Congress intended that sum to be the limit of expenditure for such objects, unless further appropriations were made. But all doubt upon this subject is removed by subsequent legislation. The act of June 2, 1879, appropriating $500,000 to be disbursed on estimates to be furnished by the board to the Secretary of the Treasury, expired, by limitation, on the 2d of June, 1883; and that of July 1, 1879, required all money authorized by it to be expended, and all contracts and liabilities incurred by the board to be paid out of the appropriation

of $500,000. The appropriation of $75,000 by the act of June 16, 1880, was for salaries and expenses of the board and to carry out the purposes of the various acts creating it. That made by the act of March 3, 1881, for "salaries and expenses" of the board, was accompanied by a direction that no more money should be expended for the purposes of the various acts creating it, out of any appropriations previously made, or by virtue of any previous law; and the act of 1882 expressly provided that "no other public money than that hereby appropriated shall be expended for the purposes of the Board of Health." These enactments evince the purpose upon the part of Congress not to create any liability upon the part of the United States, in respect to the work of the National Board of Health, beyond the amounts specifically appropriated by it from time to time for that work. This purpose, if not clearly indicated by the act of 1879 establishing the board, became manifest before the plaintiff rendered the services for which, in this action, he claims compensation, as upon implied contract. If the plaintiff is equitably entitled to be paid for any of the services in question rendered by him as a member of the board, and if the special appropriation made for the salaries and expenses of its officers and employés has been exhausted, his appeal must be made to Congress. Looking at all the acts of Congress passed before he became a member of the board, it is clear that he did not perform services as such member under any implied contract that he should be compensated otherwise than out of the moneys specially appropriated to meet the expenses incurred by the board in the performance of the duties imposed upon it. In other words, that board had no authority to incur any liability upon the part of the government for salaries or other expenses in excess of the amounts appropriated by Congress for such purposes.

These views dispose of the case adversely to the plaintiff, as to his claim for compensation as a member of the board. There is still less ground for a judgment in his favor in respect to services rendered as chief clerk, disbursing agent and secretary. Congress never intended to incur liability for such services beyond the sums appropriated from time to time for the work of the board of health. *Judgment affirmed.*

GANDY v. MAIN BELTING COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 148. Submitted January 8, 1892. — Decided March 7, 1892.

Letters patent No. 228,186, issued June 1, 1880, to Maurice Gandy, for an improved belt or band for driving machinery and an improved mechanical process of manufacturing the same, are valid, and the novelty and utility of the invention protected by it are not disturbed by the evidence in this case.

The "public use or sale" of an invention "for more than two years prior to" the "application" for a patent for it, contemplated by section 4886 of the Revised Statutes as a reason for not issuing the patent or for its invalidation if issued, must be limited to a use or sale in this country.

THE court stated the case as follows:

This was a bill in equity for the infringement of letters patent number 228,186, issued June 1, 1880, to Maurice Gandy, for an improved belt or band for driving machinery, and an improved mechanical process of manufacturing the same. In his application the patentee stated that his invention consisted, first, of an improved cotton belt; second, of an improved mechanical process for making cotton belts. "The belt consists, first, of cotton canvas or duck composed of warp stouter than the weft, both warp and weft being hard spun and the canvas hard and tight woven; second, of cotton canvas or duck thus made, folded and united by longitudinal rows of stitching and stitched under tension; third, of cotton canvas thus made, folded and stitched, saturated with linseed oil; fourth, of cotton canvas thus made, folded, stitched and saturated with linseed oil, pressed and stretched until it is hard, even and rigid, by which the belt is rendered insensible to the atmospheric changes and non-elastic."

The machinery for manufacturing the belting is also set forth in the specification, but the only claim alleged to be infringed in this case is the second, which reads as follows:

"2. The improved article of manufacture consisting of a hard, even surfaced, rigid, imperyious, non-elastic belt composed of cotton canvas or duck having its warp thread larger than the weft, both warp and weft being hard spun, the fabric tight woven and folded, stitched and saturated with linseed oil."

The bill was in the ordinary form, and prayed for an injunction and an accounting. The answer denied that the invention was new, or patentable, and also denied infringement. From a decree dismissing the bill, 28 Fed. Rep. 570, the plaintiff appealed to this court.

Mr. Amos Broadnax and *Mr. J. Edgar Bull* for appellants.

Mr. E. Cooper Shapley for appellees.

Mr. Justice Brown delivered the opinion of the court.

The bill in this case was dismissed by the court below upon the ground either that the second claim of the patent was anticipated by a provisional specification of Robert B. Jones filed in the office of the British Commissioner of Patents, July 31, 1878; or, if Gandy made the invention before the date of Jones' specification, that there had been a public use and sale of the invention for more than two years prior to the application for the patent in suit — in other words, that the same testimony which showed priority of invention on the part of Gandy, showed a public use or sale by him of such invention more than two years prior to his application.

On May 9, 1877, plaintiff Gandy, who is an alien, and a subject of Her Britannic Majesty, deposited at the office of the British Commissioner of Patents a provisional specification, upon which a patent was subsequently issued for an improvement in machinery belts. He stated the object of his invention to be the manufacture of belts of cotton canvas that would not give out by stretching, or be detrimentally affected by variations in the atmosphere, and at the same time be sufficiently pliable to allow of their running around small pulleys without cracking. To accomplish this he manufac-

tured his belts of cotton canvas or duck, "hard woven," put together either by hand or by folders, and formed into a belt of the desired width and thickness, stitched with rows of stitching, and then soaked or saturated in linseed oil. After the saturation, the canvas is formed into a belt by folding and stitching. After this, it is passed through rolls to squeeze out the superfluous oil, and it is then dried and painted, and lastly stitched. The claim of this patent was "for constructing belts or bands for driving machinery of cotton canvas or duck, 'woven hard,' and stitched, and saturated or soaked with oil, such as linseed oil or any combination thereof, as herein described or set forth, or any modification thereof." In 1883 this patent became the subject of litigation in the chancery division of the High Court of Justice, and was held to be invalid. In delivering the opinion of the court, Mr. Justice Pearson expressed a serious doubt whether the patentee could claim as a new invention a belt made of hard woven canvas, when belts made of other descriptions of canvas and saturated with oil were well known and manufactured years before. He did not, however, decide the case upon this point, but upon the ground that Gandy had not taken out his patent for his real invention. "I think," he said, "he has described something in his patent which was not his invention, and he has not described in his patent that which was really his invention. . . . It appears that in the beginning of the year 1877 Mr. Gandy was making various experiments in order to perfect a belt which he was intending to patent, and having made those various experiments with different kinds of canvas he at last discovered that a canvas of a particular strength in the warp was the best canvas that could be used for making these belts. . . . But in the patent which he took out there is not a single word to indicate that the warp ought to be stouter than the weft; least of all is there any indication that one particular strength in the warp and one particular strength in the weft would make the best canvas." The learned judge held the patent to be bad because it did not disclose the very best way of making the manufacture, remarking that in a patent subsequently obtained by him, in 1879,

he did describe the mode in which the belt was to be made, by saying that the canvas in the warp was to be stouter than in the weft.

On appeal to the Court of Appeal, the Master of the Rolls expressed regret at the misfortune of the patentee in not describing his discovery, "because," said he, "I think Mr. Gandy did make a discovery." He held that the evidence showed that Gandy's belts could only be made out of a particular class of hard-woven canvas, and, as his claim was for the whole class, it was too large. In short, he held the patent to be invalid because it did not properly describe the invention, and closed his opinion by again expressing his regret that from the way in which the specification had been drawn up, that which was a real and valuable invention in itself did not seem to have been claimed. Lord Justices Cotton and Lindley expressed practically the same opinion. *Gandy* v. *Reddaway*, 2 Cutler's Rep. of Pat. Cases, 49.

Prior to this decision, however, and on December 1, 1877, Gandy filed a substantial copy of his British specification with the Commissioner of Patents, and made a similar claim for "a belt or band for driving machinery, constructed of hard-woven cotton canvas or duck, stitched and saturated and interlarded with oil, such as linseed oil, or any combination thereof, as herein described or set forth." A patent was refused, however, upon the ground that the alleged invention was substantially anticipated by certain English patents issued in 1858 and 1861.

Subsequently, and on September 10, 1879, he filed the present application, and, after some correspondence and amendments of his original claims, this patent was issued. With his application he also filed a specimen of his belt, which was the same in all respects as the specimen filed with his prior application of December 1, 1877, and was, in fact, the identical specimen.

(1) The defence to this patent is that on the 31st day of July, 1878, one Jones filed a provisional specification with the British Commissioner of Patents for an improvement in belts, which consisted in increasing the strength of the warp or

longitudinal fibres or yarns over the weft or cross fibres — in other words, precisely the same specification as that contained in the second claim of the plaintiff's patent, or at least for the only element of such claim which is novel. Plaintiff's reply to this is that, while Jones' application antedates his own in point of time, his own invention was prior in point of fact, and in proof of this he produces the three small pieces of belt attached to his application of December 1, 1877, which the Commissioner of Patents has certified were filed in the Patent Office by Gandy at that date, and more than six months before the Jones specification was filed in the British Patent Office. This canvas is really the only one for which the patentee has sought to obtain a patent, although his first application was refused because he neglected to describe his real invention. Each of these belts is made of canvas with warp obviously larger than the weft, and containing every other element of the second claim of the patent. In relation to this Mr. Gandy also testifies that he was acquainted with Jones, who was a member of the firm of Garnock, Bibby & Co., of Liverpool, and were customers of his. "They also," said he, "made a stitched sail-cloth belting, and when they found I had taken a patent for a belting that was a success, they also applied for a patent. Seeing which in the papers, I asked Mr. Jones to tell me what he was patenting, as he need have no hesitation in doing so, seeing he had filed his provisional specification. He at once told me that it was for a belt made with the warp stouter than the weft. I told him if he would walk along to my factory I would show him that I had been using for some time before his application a cloth to make my belts in which the warp was stouter than the weft. He went with me and saw the cloth and the belts and was satisfied that such was the case, and hence went no further with his patent, but abandoned the application." The fact that no patent appears ever to have been issued upon Jones' application makes the truth of this statement seem quite probable. The canvas of which Gandy made use in England, it seems, was manufactured by the Mt. Vernon Company of Baltimore, and in further proof of the date of his invention,

he produced the testimony of the shipping clerk of that firm, who swore that as early as 1876 the firm shipped to Gandy belting canvas having the warp threads stouter than the weft; there being six plies in the warp and only four in the weft. Mr. Gandy also swears that since 1875 all the canvas ordered by him was made with the warp stouter than the weft. As there is no testimony to contradict this it must be accepted as a fact in the case.

(2) The court below, however, found that, conceding that his invention was made as early as 1876, antedating the filing of Jones' specification by some two years, the same testimony also proved that it had been in public use more than two years before filing his application, and that under Rev. Stat. section 4886, the patent was therefore void. All that the evidence upon this point shows is that Gandy ordered all his canvas made by the Mt. Vernon Company and shipped to him at Liverpool. There is no direct testimony to show whether this canvas was made up into belting, or when the belts were first publicly used or sold abroad. Indeed, nothing to show that it was in public use or on sale before the application for the patent in this suit was filed. Even if we were authorized to presume that such canvas was manufactured into belting and sold or used in England, there is not a particle of testimony tending to show that it was publicly used or put on sale in this country. Conceding that there was sufficient evidence of the use of such belting in England, we think that this does not vitiate the patent. Section 4886 declares that "any person who has invented or discovered any new and useful art, machine, manufacture or composition of matter, or any new and useful improvement thereof, not known or used by others in this country, and not patented or described in any printed publication in this or any foreign country before his invention or discovery thereof, and *not in public use or on sale for more than two years prior to his application*, unless the same is proved to have been abandoned, may, upon payment of the fees required by law, and other due proceedings had, obtain a patent therefor." It is true that the language of this section contains no restriction as to the place or country wherein the public use

is made of the invention; but taken in connection with section 4887, providing that no person shall be debarred from receiving a patent, by reason of the invention being first patented abroad, "unless the same has been introduced into public use in the United States for more than two years prior to the application," we think that the public use or sale contemplated by section 4886 must be limited to a use or sale in this country. That this was the intent of Congress is also manifest from section 4923, providing that whenever it appears the patentee believed himself to be the original and first inventor of the thing patented, his patent shall not be held void "on account of the invention or discovery, or any part thereof, having been known or used in a foreign country before his invention or discovery thereof, if it had not been patented or described in a printed publication." So also in section 4920, providing what the defendant may plead under the general issue in actions for infringement, there is included the defence "that it had been in public use or on sale in this country for more than two years before his application for a patent, or had been abandoned to the public."

Taking all these provisions of the patent law together, we think it was manifestly the intention of Congress that the right of the patentee to his invention should not be denied by reason of the fact that he had made use of it, or put it on sale abroad, more than two years before the application, provided it were not so used or sold in this country.

(3) The questions of novelty and utility may properly be considered together. There is much testimony tending to show that Gandy believed himself to be the inventor of a belting made of hard woven canvas stitched and saturated with oil, and that the importance of having the warp stouter than the weft was not fully appreciated by him, and hence was not made an element of the claim of his original British patent. The testimony, however, shows that the canvas or duck ordinarily used for sails is made with the weft as stout, if not stouter, than the warp, and that such canvas was found to be impracticable for belting on account of its liability to stretch or to crack in passing around the smaller pulleys. His first

belts made of ordinary soft canvas proved to be wholly impracticable owing to their apparently endless capacity for stretching. He next experimented with hard-spun and tight-woven canvas, specially manufactured for this purpose. This did not stretch, but developed another fault, of wrinkling and cracking when running around pulleys. This he obviated by saturating it with linseed oil; but found another objection in the unequal strain on the several thicknesses when passing around the pulleys, which tended to break the stitching and permitted the plies to separate. He then conceived the idea that by decreasing the thickness of the belt, without diminishing its tensile strength, he would bring the diameter of the exterior plies more nearly level with the inner plies next the pulley, and thus more nearly equalize the strain on all parts of the belt, increasing its effective strength and diminishing the tendency of the plies to separate or wrinkle. It is obvious even to a non-expert that, if the belting be made very thick, there is a much greater strain upon the exterior plies, when passing around a small pulley, than upon the inner plies, and that the effect must be both to unduly strain the exterior plies, rendering them liable to break, and to wrinkle the inner ones, subjecting them to the danger of cracking; and that the ideal belting would be made as thin as would be consistent with the requisite strength and inflexibility. In view of the fact that previous attempts, of which there appear to have been several, to make a practical canvas belt had been failures, and that Gandy had been experimenting with the subject for several years before he discovered that a change was necessary in the structure of the canvas itself, we do not think his improvement is a change in degree only, or such an one as would have occurred to an ordinary mechanic, and our opinion is that it does involve an exercise of the inventive faculty. The change is such as would only have occurred to one familiar, not alone with the impossibility of making a practical belt out of the ordinary canvas, but to one who had bestowed considerable thought upon the method of overcoming the difficulty. While some of the testimony would seem to indicate that there is no great advantage in this method of

construction, we think the fact that it has been largely adopted by manufacturers and that all the modern improved belting ordered or made by Gandy and in general use both in this country and in Europe, is made in this way, is, for the purposes of this case, sufficient evidence of its utility. *Magowan* v. *New York Belting Co.*, 141 U. S. 332.

(4) We have no doubt upon the subject of infringement. While, as claimed by the defendant Plummer, there may be as many plies or individual threads in the weft of his canvas as in the warp, the most casual observer of the relative strength of the warp and the weft cannot fail to notice that the former is much thicker and stouter than the latter — in fact, that the Gandy belting and the defendants' in this particular are identical. The defendant Plummer having adopted Gandy's idea of making warp stouter than his weft, is not in a favorable position to claim that it is useless. Indeed, Plummer appears to have been formerly in business with Gandy, and was sent by him to America in 1879 to confer with his solicitor in reference to his pending application for a patent. Gandy subsequently decided to start the manufacture of belting in America, and to give Plummer employment, and for that purpose took him into his factory in Liverpool, so as to give him an insight into the business. In 1880 he came to America, was met by Plummer, leased a building for a factory, and took him into his employ. Plummer seems, however, to have failed to give satisfaction, and Gandy subsequently dismissed him from his service, whereupon Plummer proceeded to organize a company upon his own account for the manufacture of the infringing belting. In pursuance of this intention he states himself that he came to Washington, examined the Gandy patents, and took legal advice with regard to making a belt which would not infringe them. He also suggested to plaintiff the danger of his marking an unpatented article with words importing that it is patented, and called his attention to Rev. Stat. sec 4901, making this a penal offence.

The language of Mr. Justice Woods, in delivering the opinion of this court in *Lehnbeuter* v. *Holthaus*, 105 U. S. 94, 96, is equally pertinent to this branch of the case: "The patent is

prima facie evidence both of novelty and utility, and neither of these presumptions has been rebutted by the evidence. On the contrary, they are strengthened. No anticipation of the design is shown, although the attempt has been made to prove anticipation. The fact that it has been infringed by defendants, is sufficient to establish its utility, at least as against them."

The decree of the Circuit Court is, therefore,

Reversed, and the case remanded with directions to enter an interlocutory decree for the plaintiff, and for further proceedings in conformity with this opinion.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY *v.* DENVER AND RIO GRANDE RAILROAD COMPANY.

DENVER AND RIO GRANDE RAILROAD COMPANY *v.* CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

Nos. 1095, 1109. Submitted January 7, 1892. — Decided March 7, 1892.

In the interpretation of any particular clause of a contract, the court is required to examine the entire contract, and may also consider the relations of the parties, their connection with the subject matter of the contract, and the circumstances under which it was made.

The Chicago, Rock Island and Colorado Railway Company contracted with the Denver and Rio Grande Railroad Company for the use by the former of the tracks, stations, sidings, switches, etc. of the latter company between Colorado Springs and Denver, (except its shops at Burnham), and also for its terminal facilities at Denver, and, having so contracted made its connections and entered on the enjoyment of its rights under the contract. Shortly afterwards the Chicago, Rock Island and Pacific Railway Company was organized and acquired the property and rights of the Chicago, Rock Island and Colorado Railway and entered into the enjoyment of them, and its rights were recognized by the Denver and Rio Grande Railroad Company. The Rock Island and Pacific Company then acquired a right to connect with the Union Pacific Railroad

Statement of the Case.

Company at Limon, and to run its eastern trains over the tracks of the latter company to Denver, which it did. The distance from Limon to Denver by this route was sixty-four miles less than by the way of Colorado Springs and the Denver and Rio Grande road. Although it had diverted its Denver traffic, it continued to use the Rio Grande road for its Pueblo traffic, and it claimed the use of the terminal facilities of that road at Denver for all, and also the use of some land at Burnham not actually used for shops. It also claimed the right under the contract to put in its own switching forces and cleaning gangs. The Denver and Rio Grande Company then gave notice that it would exclude from the Denver terminals all business coming over the Union Pacific tracks. Thereupon the Rock Island Company filed a bill in equity and obtained a restraining order. By amendments and supplemental bills there were brought into the controversy other matters of difference between the two companies and a final decree was made settling their rights under the contract as follows: (1), that the new Rock Island Company was the successor of the old, and had the right under the contract to operate its trains over the Rio Grande Company's line; (2), that it had not the right, under the contract, to bring its trains to the Denver terminals over the Union Pacific; (3), that it had the right to employ separate switching crews and separate employés to perform other services in the yards of the Rio Grande Company under the control and subject to the direction of the agent of that company; (4), that the words "shops at Burnham" in the contract included all lands used or procured for shop purposes and appurtenant to the shops located at Burnham; (5), that a track should be set apart at Denver on which the Kansas Pacific Company might clean its cars; (6), that each party should pay one-half of all costs. On appeal this court *Held*,

(1) That the plaintiff was entitled to file this bill;

(2) That it was never intended to grant the use of terminal facilities for the Rock Island road, except as appurtenant to the use by it of the Rio Grande road;

(3) That the exception of the shops at Burnham not only included the buildings actually used for mechanical purposes, but also two tracts purchased for the use of the shops, and intended to be devoted to such purposes;

(4) That there was no error in the decree of the court below as to the employment of separate switching crews;

(5) That the cleaning of the cars could be done by the Rock Island Company, but the Rio Grande Company was bound to furnish track facilities for it;

(6) That it was not necessary to decide questions raised as to the discharge of employés engaged in the operation of that part of the road jointly occupied and used under the contract.

THE court stated the case as follows:

This was a bill in equity brought by the Chicago, Rock

Island and Pacific Railway Company, (hereafter designated as the Rock Island Company,) against the Denver and Rio Grande Railroad Company, (hereinafter designated as the Denver Company,) to enforce an alleged right to certain terminal facilities at the city of Denver, and for certain incidental purposes, hereinafter stated in the opinion. There was also a cross-bill filed to enjoin the plaintiff from making use of such facilities, and for other purposes, which was subsequently dismissed by stipulation of the parties.

The litigation arose out of a contract entered into on the 15th day of February, 1888, between the Denver Company and the Chicago, Rock Island and Colorado Company, (hereinafter designated as the Chicago Company,) for the joint use and possession of the Denver road between Denver and Pueblo, the material portions of which are printed in the margin.[1]

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[1] *Material portions of the contract of February* 15, 1888.

Articles of agreement made and entered into this fifteenth (15th) day of February, in the year eighteen hundred and eighty-eight, by and between the Denver and Rio Grande Railroad Company, a corporation organized and existing under the laws of the State of Colorado, hereinafter referred to as the "Denver Company," and the Chicago, Rock Island and Colorado Railway Company, a corporation organized and existing under the laws of the same State, hereinafter referred to as the "Chicago Company," witnesseth:

First. The Denver Company owns and operates a railway with appurtenant property, a portion of the main line of which extends from Denver through Colorado Springs to South Pueblo, all in the State of Colorado; and the Chicago Company owns a railway which is being constructed from the western boundary of the State of Kansas, at which point it will connect with the Chicago, Kansas and Nebraska Railway to the city of Colorado Springs, above mentioned.

Second. The interest of both parties and of the public will be promoted by the establishment and operation of a through line of railway between all the points of the railway of the Denver Company between and including Denver and South Pueblo, and all points on the line of railway which will be operated by the Chicago Company, and on the system of railways of which the Chicago Company will form a part.

Therefore, in consideration of the premises and of the several covenants, promises and agreements hereinafter set out, the parties do covenant, promise and agree to and with each other as follows:

Article I.

The Denver Company covenants, promises and agrees to and with the Chicago Company:

Statement of the Case.

Pursuant to art. III, § 10, of this contract, the president of the Chicago Company, on March 17, 1888, gave written

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SECTION 1. It hereby lets the Chicago Company into the full, equal, joint and perpetual possession and use of all its tracks, buildings, stations, sidings and switches on and along its line of railway between and including Denver and South Pueblo, excluding its shops at Burnham, meaning and intending hereby to include in the description aforesaid all and every portion of its railway, and appurtenant property, between and at the points aforesaid, and all improvements and betterments thereof and additions thereto, which may be jointly used by the parties, as hereinafter provided.

SEC. 2. It will maintain and keep in good repair the property described in the preceding section, during the term of this contract, and will comply with all regulations prescribed by law for the safety of the public.

SEC. 3. It will, if required by the Chicago Company, provide the necessary housing and care of the locomotives which said party may have from time to time at Denver and South Pueblo, upon reasonable terms, which shall be agreed to by the general managers or other authorized officers of the two companies. It will, upon like requisition, furnish in the same manner it provides its own locomotives on its tracks above described, all water and coal which the Chicago Company will need for the operation of its trains over the railway of the Denver Company. The compensation which shall be paid for the water supply shall be ascertained on the basis of wheelage as hereinafter provided for expenses of maintenance and repairs; and the compensation for coal so furnished shall be the actual cost thereof in the shutes and platforms from which it is transferred to the locomotives of the Chicago Company. . . .

SEC. 4. It will pay all taxes and assessments which shall be levied or assessed directly or indirectly upon or against the property described in article 1, section 1, hereof, or upon either the gross or net earnings thereof during the term of this indenture.

SEC. 5. It will at the commencement of said term, if so required by the Chicago Company, provide, and, during the continuance thereof maintain, at Denver and South Pueblo, for the exclusive use and control of said Chicago Company, engine-houses conveniently located and having the necessary fixtures and sufficient capacity to properly and safely shelter all locomotive engines which said company may have occasion to use on the railway of the Denver Company. . . .

Article II.

The Chicago Company covenants, promises and agrees with the Denver Company as follows:

SECTION 1. It hereby accepts the covenants, promises and agreements made and entered into by the Denver Company.

SEC. 2. It will, from and after the completion of its railway from the boundary line of the State of Kansas to a connection with the railway of

notice to the defendant company that the Chicago Company elected, as provided by the contract of February 15, 1888, "to

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the Denver Company at or near Colorado Springs, while this agreement remains in force, pay monthly for the use of the premises described in article 1, section 1, hereof, the sum of the following amounts:

First. An amount equal to a one-twelfth part of two and one-half per centum of the value of the property described in article 1, section 1, hereof, and which value it is agreed is three million dollars; . . .

Second. An amount equal to a one-twelfth part of two and one-half per centum per annum upon all sums which the Denver Company shall from time to time pay for the construction or acquisition of additional tracks, facilities and conveniences under section 1, article 3, hereof, except round-houses at Denver and Pueblo.

Third. An amount equal to a one-twelfth part of five per centum upon the cost of constructing, and in addition thereto the cost of repairing round-houses which the Denver Company may erect and maintain at Denver and South Pueblo, for the exclusive use of the Chicago Company, as provided in section 5, article 1, hereof.

Fourth. An amount equal to the proportion of the cost or expenses actually incurred and paid during the month for keeping the railway and appurtenant property described in the first section of article 1, hereof, in repair, and supplying it (the Chicago Company) with water, as the number of wheels per mile run by it, the Chicago Company, over said railway, or any part thereof, bears to the whole number of wheels per mile run over the same during the same period.

Fifth. An amount equal to the actual cost of the coal delivered during the month to the engines of the Chicago Company under this contract.

Sixth. An amount equal to a proportional share of the expenses actually incurred in paying proper salaries to the general superintendent and subordinate employés, including switchmen, telegraph operators, train dispatchers, and others, necessarily employed in the performance of the duties incident to the joint use and occupation of said railway, not including trainmen, which proportion shall be ascertained in the manner provided in paragraph number four, above set out.

Seventh. An amount equal to one-half of all taxes and assessments lawfully levied and actually paid during the month upon the property described in article 1, section 1, hereof; that is, that portion of the railway and appurtenant property used by the Chicago Company under this contract, excluding shops at Burnham, and equipments, facilities and conveniences not intended for joint use by the parties hereto. . . .

Tenth. No compensation will accrue or be paid to the Denver Company from or by the Chicago Company, for the use and occupation of said premises before the railway of the Chicago Company shall be completed from its initial point on the western boundary of the State of Kansas to a connection of the railway of the Denver Company within the time hereinafter specified.

build its railway from the western boundary of the State of Kansas to Colorado Springs, and that it will have the same

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Eleventh. The cost of operating and maintaining all tracks, structures and facilities used jointly by the Denver Company and the Chicago Company shall be apportioned between said companies on a wheelage basis. . . . Said Denver Company shall receive from the Chicago Company such a portion of the expenses incurred by the Denver Company in operating and maintaining the railway between Denver and Pueblo operated and maintained by the Denver Company, which shall be as the entire wheelage of the Chicago Company is to the entire wheelage on said railway between Denver and Pueblo.

SEC. 3. It is legally incorporated and has power to construct, maintain and operate a railway which will extend from the western boundary of the State of Kansas to Colorado Springs, in the State of Colorado, and to make and perform on its part the several covenants, promises and agreements in these articles contained. . . .

Article III.

SECTION 1. If the Chicago Company shall at any time during the continuance of the term of this indenture deem any additional side-tracks or double tracks between said Denver and South Pueblo, or along any portion of the line of railway between said points, essential or necessary, it shall call upon the Denver Company to construct the same upon reasonable notice. . . .

The Chicago Company shall pay monthly, as compensation for the use of the same, one-twelfth of two and a half per centum per annum of the cost of such construction, as is provided in article 2, section 2, and its share of maintenance thereof based on wheelage, as provided in said section.

If additions are made by the Denver Company to its terminal facilities at Denver or South Pueblo, by the building of additional tracks, the Chicago Company shall have the right and privilege to occupy and enjoy equal use of the same, if it shall so elect, and if it shall so elect then it shall from the time of such election pay monthly to the Denver Company, as compensation for such use, one-twelfth of two and one-half per centum upon the cost thereof plus interest at two and one-half per centum per annum upon such cost from the time of construction until the date of such election in the manner provided in article 2, section 2, hereof, and its share of maintenance thereof, after such election, based on wheelage, as is provided in said article.

If the Chicago Company shall at any time during the continuance of the term of this indenture desire any side, spur, or other tracks, other than those above specified, connecting any track described in article 1, section 1, hereof, with its own tracks, or with the tracks of any other railway company, or to any industry, or shall desire any facilities or conveniences which do not now exist, it shall give to said Denver Company notice of

ready for operation on or before the thirty-first day of December, in the year one thousand eight hundred and eighty-nine."

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such desire, and the said Denver Company may, within thirty days after receiving said notice, proceed to construct such tracks or acquire such facilities and conveniences; and the Chicago Company will pay for the use of the same, in monthly instalments, as provided in article 2, section 2, hereof, a sum equal to a one-twelfth part of two and one-half per centum per annum from the date of such construction or acquisition, upon the cost of constructing or acquiring such tracks, facilities and conveniences, and shall pay in addition thereto its share of the cost of the maintenance thereof, based on wheelage, as herein provided. If the Denver Company shall neglect or refuse to construct such tracks or acquire such facilities and conveniences within a reasonable time, the Chicago Company, at its own expense, in its own name, or in the name of some third person or corporation, as it may be advised, may construct or acquire the same, and it shall be the sole owner, and have the right to use and remove the same, or any part thereof, during the term of this indenture. . . .

SEC. 2. Schedules of rules and regulations for the movement of engines and trains over the railway described in article 1, section 1, hereof, shall be made from time to time by officers duly authorized by the parties. Such schedules shall, as nearly as may be practicable, accord equality of right, privilege and advantage to trains of the same class operated by both parties, and to trains of a superior class operated by either party, and a preference over trains of an inferior class operated by the other. All schedules of rules and regulations shall be reasonable and just to both parties, and shall secure to neither any unfair preference or discrimination against the other. They shall be executed and all trains shall be moved under the immediate direction of the superintendent, or other officer duly authorized, of the Denver Company. . . .

SEC. 3. Any employé of one company engaged in the operation of any part of the railway jointly occupied and used under this contract shall be removed from that portion of said line upon the request of the other.

SEC. 4. The Chicago Company will do no business as a carrier of persons or property between intermediate stations between Denver and Colorado Springs, or between intermediate stations between Colorado Springs and Pueblo, or between any such intermediate station and Denver, Colorado Springs, or Pueblo; but it shall have the right to transport persons and property between stations on its railway and connecting lines and all points between and including Denver and South Pueblo: provided, however, that if the Chicago Company shall at any time acquire by purchase, construction or otherwise a railway extending not less than fifty (50) miles from Pueblo, it shall have the right to transfer persons and property between any point on such line and Denver. . . .

The Chicago Company will not permit any express company to do business on its trains to or from stations on the line of the Denver Company

Soon after this, the Chicago Company completed its connection with the Denver Company's line at Colorado Springs, and thereafter for some time brought all its trains by the way of Colorado Springs, to Denver and Pueblo over the defendant's line. The distance from Denver to Pueblo is about 120 miles, Colorado Springs being an intermediate station, nearly midway between the termini.

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between South Pueblo and Colorado Springs, or between stations between Colorado Springs and Denver, or from Denver to South Pueblo, or from South Pueblo to Denver. It may permit such a company or companies to carry property on its trains from Denver to Colorado Springs, from Pueblo to Colorado Springs, and to and from stations on its own railway and connecting lines to and from all points between and including Denver and South Pueblo. . . .

In the division between the parties hereto of joint rates on through traffic, including all transported by each party which shall pass through Pueblo or Denver to or from the railway of the Chicago Company at Colorado Springs, no difference between the hauls made by the parties respectively on the railway of the Denver Company between Denver and Pueblo shall be considered. For example, if the Denver Company receives through traffic from points beyond Denver or South Pueblo and hauls the same to Colorado Springs, and there delivers it to the Chicago Company it will receive no greater division of the through rate than it will receive for like traffic delivered at Denver and South Pueblo; and if the Chicago Company hauls through traffic destined to points beyond Denver or South Pueblo to said points, instead of delivering it to the Denver Company at Colorado Springs, it will receive no larger division of the through rate because of such additional haul. . . .

SEC. 9. This contract shall attach to and run with the railways of the respective parties during the corporate existence of each, and of all extensions of such existence, by renewal or otherwise; and shall be binding upon the lessees, assigns, grantees and successors of each during the continuance of their several corporate existences: provided, however, that the Chicago Company can assign its interests in this contract only by a sale, lease, or consolidation of its own property. . . .

SEC. 10. The Chicago Company shall, on or before the first day of April, in the year one thousand eight hundred and eighty-eight, notify the Denver Company whether or not it elects to build its line aforesaid from said point on the western boundary line of the State of Kansas to said Colorado Springs. If it shall elect to build said line it agrees to complete the same and to occupy the line of the Denver Company, and to be bound by the terms of this contract, on or before the 31st day of December, in the year 1889. If it shall elect not to build said line this contract shall, on the said 1st day of April, in the year 1888, become void and of no effect. . . .

Statement of the Case.

In April, 1889, the Rock Island Company, claiming to be the successor in interest of the Chicago Company under the contract, assumed the operation of that company's line, and about the same time entered into a contract with the Union Pacific Company, by the terms of which the Rock Island Company acquired the right to connect its railway with that of the Union Pacific at Limon, about ninety miles east of Denver, and to run its trains over the track of the Union Pacific from that point to Denver, which was sixty-four miles shorter than that by Colorado Springs, and over a road the maximum grade of which was much less than the other. From that time to the present the plaintiff has transacted most of its business to and from Denver over the Union Pacific line, bringing the same over no portion of the Denver Company's line; but at the same time has sought to utilize the defendant's terminal facilities at Denver for the handling of its business. It has still continued, however, to send its Pueblo traffic by way of Colorado Springs, and over the line of the defendant's road.

Immediately after its Denver business began to be thus diverted, and on May 10, 1889, the general manager of the Denver Company telegraphed Mr. Cable, the president of the plaintiff company, as follows: "I have just seen Mr. Allen, general superintendent, and have notified him that although we are not required by our contract to handle or care for your trains and equipment brought to Denver over the Union Pacific line, we do so temporarily, and with the understanding that the compensation for such service, as also for the use of our tracks for such trains, will be made at an early date." To this Mr. Cable replied the next day, as follows: "Your telegram received. Of course any service performed for us, not covered by contract, will be paid for by our company. When I come out in June I will spend time enough with you to take up matters between us that may require attention. I have no doubt that everything can be satisfactorily arranged."

No payment for the use of such terminal facilities appears, however, to have been made, the plaintiff asserting its right to use these terminals, for its business brought over the Union

Pacific tracks, under the contract made with the Chicago Company. The parties being unable to agree upon a proper construction of the contract, the defendant gave notice that it would, on August 1, 1890, exclude from its Denver terminals all business brought over the Union Pacific tracks. Thereupon the Rock Island Company filed this bill, and applied for a restraining order, which was granted. By amendments and supplemental bill there were brought into the controversy other matters of difference which had arisen between the two companies. Upon the hearing in the Circuit Court a decree[1]

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[1] "This cause coming on now to be finally heard, upon the complainant's bill of complaint and amendments thereto, and its supplemental bill of complaint, and upon the amended answer of the defendant to the complainant's bill of complaint and amendments thereto, and the answer of said defendant to the complainant's supplemental bill of complaint, and upon the issues joined thereon between the parties, and upon the evidence adduced in said cause, and the court now having heard the same and the arguments of counsel, the court doth now find, order, adjudge and decree as follows:

"1. That under the provisions of the contract bearing date February 15, 1888, made and entered into between the Denver and Rio Grande Railroad Company, the defendant above named, and in said contract described as 'The Denver Company,' of the one part, and the Chicago, Rock Island and Colorado Railway Company, in said contract described as 'The Chicago Company,' of the other part, being the contract set forth in the complainant's bill of complaint, the complainant, The Chicago, Rock Island and Pacific Railway Company, as the successor in interest of the said The Chicago, Rock Island and Colorado Railway Company, has the right to operate its trains over the line of the defendant company, described in said contract, with all the rights and subject to all the limitations in said contract granted and reserved as to the said The Chicago, Rock Island and Colorado Railway Company.

"2. That the said complainant is not, under said contract, entitled, nor has it any right to bring its engines, cars or trains over the tracks of the Union Pacific Railway Company, into or upon the Denver terminals of the defendant company; and that said complainant has no right under said contract, in the tracks, switches, side-tracks or terminals of the said defendant, except for such business as it brings upon said tracks by the way of the city of Colorado Springs; that the rights granted under said contract by the defendant to the said The Chicago, Rock Island and Colorado Railway Company, run with and are appurtenant solely to the line of railway connecting with the defendant's line of railway at said city of Colorado Springs; and that the complainant is, under said contract, entitled to carry business to and from any portion of the defendant's said line of railway,

was made settling the rights of the two companies to this contract (45 Fed. Rep. 304), from which both parties appealed to this court.

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described in said contract, by the way of said city of Colorado Springs and not otherwise.

"3. That the complainant under and by virtue of said contract, is entitled to and has the right, at its option, to employ its separate switching crews, and operate its own switching engines in the railroad yards of the defendant company, under the sole and absolute supervision, direction and control, however, of the yard master, or other properly constituted officer or agent of the defendant, and subject to the orders and instructions of said yard master, or other officer or agent so appointed by the said defendant, which orders and instructions shall be given and executed in good faith and without discrimination, and in accordance with the provisions of said contract.

"That the complainant is also entitled and has the right at its option, to handle traffic with its separate employés, and to perform any other service which can be performed for it exclusively, including the handling of traffic received from or delivered to other railroads by the complainant, to the same extent and as fully in all respects as the defendant may perform like services for itself, and have like use of the joint property for that purpose.

"4. That the words 'Shops at Burnham' used in section one (1) of Article (1) of said contract of February 15, 1888, include all lands used or procured for shop purposes and appurtenant to the shops located at Burnham, on the west side of defendant's main line of railway, bounded on the north by the north line of the parcel of land known as the 'Burlingame tract,' and on the south by the north line of the parcel of land known as the 'Bailey tract' (being the north line of Vasquez street), containing sixty acres, more or less, together with all buildings, tracks and other improvements or appurtenances thereon situated; and that the complainant has no interest in or right to the use of any portion of said premises hereinabove described.

"The complainant shall not be excluded from the use of the wye track at Burnham for the turning of its engines, cars and trains, so long as it shall continue to pay for the use thereof interest at the rate of two and one-half per cent (2½ %) per annum on the cost of its construction, unless and until the defendant shall provide at Denver another wye track for the turning of such engines, cars and trains.

"5. The parties shall set apart a track at Denver on which the complainant shall have the right to clean its cars, and if no existing track can be conveniently devoted to that purpose, the defendant shall construct and equip a track therefor, at the joint expense of the parties, plaintiff and defendant.

"6. It is further by the court ordered and adjudged, that each of the parties, plaintiff and defendant, shall pay the one-half of all costs taxed up or to be taxed in this cause."

Mr. Thomas F. Withrow, *Mr. Thomas S. Wright* and *Mr. A. E. Pattison* for appellant.

Mr. Edward O. Wolcott and *Mr. Joel F. Vaile* for appellee.

MR. JUSTICE BROWN delivered the opinion of the court.

(1) A preliminary question is made with regard to the rights of the Rock Island Company as the successor of the Chicago Company under the contract of February 15, 1888. By art. III, § 9, of this contract it was provided that it should "attach to and run with the railways of the respective parties during the corporate existence of each, and of all extensions of such existence, by renewal or otherwise, and shall be binding upon the lessees, assigns, grantees and successors of each, during the continuance of their several corporate existences; provided, however, that the Chicago Company can assign its interests in this contract only by sale, lease or consolidation of its own property." The original companies, of which the Rock Island Company claims to be the successor, appear to have been the St. Joseph and Iowa Railroad Company, a Missouri corporation, and the Chicago, Kansas and Nebraska Railway Company, a Kansas corporation. On May 15, 1886, the latter company leased its property and franchises to the former, which entered into possession under such lease, which is still in force. On June 13, 1888, after this contract was made, the Chicago, Kansas and Nebraska Company and the Chicago, Rock Island and Colorado Company were consolidated under the name of the Chicago, Kansas and Nebraska Railway Company, which consolidated corporation is admitted by the answer to have succeeded to and become vested with all the property and property rights, and all the corporate rights, powers, franchises and privileges of the said two constituent companies, including the contract between the Chicago Company and the defendant, and thereby entered into possession and enjoyment of the same.

It is unnecessary to set forth at length the numerous steps by way of assignments, leases and consolidations by which

the Rock Island Company became the assignee of the Chicago Company under this contract. It is sufficient, for the purposes of this case, that it assumed to take the place of the Chicago Company; that it entered into open possession of the property of that company, and upon the performance of this contract, on the first of January, 1889; that it was recognized by the Denver Company as taking the place of the Chicago Company; that this was done with the consent of that company, and that no question was ever made by the Denver Company of its rights under this contract until its answer was filed in this case: and in its cross-bill the Denver Company prayed for the specific performance of the contract against it. From the time of the consolidation in June, 1888, business was transacted with the defendant in the name of the Chicago, Kansas and Nebraska Company, the consolidated company; and the defendant in issuing its time-cards, at the time connection was made and trains began to run, upon the information furnished it by the officers of that road, designated its trains as the "Chicago, Kansas and Nebraska Express," etc. In May, 1889, upon the request of plaintiff's officers, the caption was changed to the "Chicago, Rock Island and Pacific." On May 16, a notice was issued stating that plaintiff had assumed the operation of the Chicago, Kansas and Nebraska Railway. Upon this coming to the hands of the law department of the defendant in July, some correspondence was had, by which the defendant was apprised that the Rock Island Company was operating the line of the other under a lease. Upon this information, the managing officers of the defendant recognized the plaintiff as the successor in interest under the contract, and made no question of its rights for more than a year thereafter. Had the Denver Company refused to recognize the plaintiff as the legal successor of the Chicago Company, and refused to acknowledge its contract with the Chicago Company as importing any obligation or liability on its part towards the plaintiff, a serious question might have arisen as to the rights of the latter, under this alleged assignment, as the successor of the Chicago Company. But, under the circumstances of this case, a court of equity will treat the as-

signee in fact as the legal assignee, possessed of the rights and charged with the obligations of the original party to the contract. *Wiggins Ferry Co.* v. *Ohio & Mississippi Railroad*, 142 U. S. 396. In short, we find no difficulty in holding that the plaintiff was entitled to file this bill.

(2) The most important question in this case relates to the proper construction of art. 1, § 1, wherein the Denver Company "lets the Chicago Company into the full, equal, joint and perpetual possession and use of all its tracks, buildings, stations, sidings and switches, on and along its line of railway, between and including Denver and South Pueblo, excluding its shops at Burnham, meaning and intending hereby to include in the description aforesaid all and every portion of its railway and appurtenant property between and at the points aforesaid, and all improvements and betterments thereof, and additions thereto, which may be jointly used by the parties, as hereinafter provided." The question is whether this general language is controlled or limited by the facts existing at the time the contract was executed, or by the subsequent provisions of the contract itself. If this be in fact a lease, without qualification, of the entire road and appurtenant property between Denver and South Pueblo, then the Rock Island Company has a right to make use of as much or as little as it pleases, and to introduce its trains upon the tracks of the Denver Company wherever it may choose to do so. It may not only make use of the terminal facilities at Denver for its traffic over the Union Pacific, but it may contract for trackage over any road running to Denver, Pueblo, or the intermediate stations, and demand the use of the defendant's terminals for its entire business over such roads.

There can be no doubt whatever of the general proposition that, in the interpretation of any particular clause of a contract, the court is not only at liberty, but required, to examine the entire contract, and may also consider the relations of the parties, their connection with the subject matter of the contract, and the circumstances under which it was signed. Prior to the execution of this contract, the Chicago Company had determined to construct a road into the State of Colorado

from its eastern boundary. Its officers had not, however, settled upon the particular route — whether they should build an independent road from the Kansas State line to Denver, with a branch to Pueblo, or build a connection with the defendant's road at Colorado Springs, thence reaching Denver and Pueblo over defendant's line. This connection had not been made at the time the contract was entered into, though there is a preliminary recital that "the Chicago Company owns a railway which is being constructed from the western boundary of the State of Kansas, at which point it will connect with the Chicago, Kansas and Nebraska Railway, to the city of Colorado Springs," indicating very clearly that this was the road within the contemplation of the parties. Indeed, there was an express provision in the body of the contract (art. III, § 10) that the Chicago Company should, on or before the first day of April, 1888, notify the Denver Company whether or not it elected to build its line to Colorado Springs, and that if it should elect to build such line it was to complete the same and to occupy the line of the Denver Company, and to be bound by the terms of the contract, on or before the thirty-first day of December, 1889. "If it shall elect not to build said line, this contract shall on the said first day of April, in the year 1888, become void and of no effect;" — in other words, the very life of the contract was made to depend upon the fact whether this connection was made, and until that time it was not to go into operation. It is quite evident from this that if, instead of completing its road to Colorado Springs, the Chicago Company had made the connection with the Union Pacific which it subsequently did make, the Denver Company would not have been under the slightest obligation to afford the terminal facilities which the plaintiff now claims. The Denver Company as well as the Chicago Company undoubtedly had an object in view in making the contract, which was largely, at least, to obtain a revenue from the use of its tracks between Denver and Pueblo, of which the terminal facilities at these points were but an incident.

Indeed, the contract from beginning to end is full of provisions which indicate that the minds of the parties met only

upon an understanding that the Chicago Company should make its connection with the Denver road at Colorado Springs, and should make a constant use of its tracks from that point to Denver and Pueblo, and, inferentially at least, that the Denver Company would not have consented to it upon any other theory. The preamble contains a recital that "the interest of both parties and of the public will be promoted by the establishment and operation of a through line of railway between all the points on the line of the railway of the Denver Company, between and including Denver and South Pueblo, and all points on the line of railway which will be operated by the Chicago Company, and on the system of railways of which the Chicago Company will form a part." By art. II, § 3, the Chicago Company covenanted that it had power to construct a line from the western boundary of Kansas to Colorado Springs. By art. I, § 3, the Denver Company is to furnish "all water and coal which the Chicago Company will need for the operation of its trains *over the railway of the Denver Company.* It agrees, if so required, to provide and maintain engine-houses to properly and safely shelter all locomotive engines which said Chicago Company may have occasion to use on *the railway of the Denver Company.*" (Art. I, § 5.) The rent payable by the Chicago Company began to run "from and after the completion of its railway from the boundary line of the State of Kansas to a connection with the railway of the Denver Company at or near Colorado Springs." (Art. II, § 2.) And there was a further express provision that "no compensation will accrue or be paid to the Denver Company from or by the Chicago Company for the use and occupation of said premises, before the railway of the Chicago Company shall be completed from its initial point on the western boundary of the State of Kansas to a connection with the railway of the Denver Company within the time hereinafter specified." (Art. II, § 2, sub. 10.) Among the payments to be made was a proportionate amount of the cost or expenses for keeping the railway and appurtenant property in repair, and supplying it (the Chicago Company) with water, "as the number of wheels per mile run by it, the Chicago

Company, over said railway, or any part thereof, bears to the whole number of wheels per mile run over the same during the same period," (Art. II, § 2, sub. 4,) — a provision wholly inapplicable to the separate use of terminal facilities; since it needs no argument to show that the amount of compensation for the use of such facilities cannot be practically determined upon a wheelage basis.

By art. III, § 4, the Chicago Company agrees to do no business as a carrier of persons or property between Denver and Colorado Springs, or between intermediate stations between Colorado Springs and Pueblo, or between any such intermediate stations and Denver, Colorado Springs or Pueblo; but it was to have the right "to transport persons and property between stations on its railway and connecting lines, and all points between and including Denver and South Pueblo: Provided, however, that if the Chicago Company shall at any time acquire by purchase, construction or otherwise, a railway extending not less than fifty miles from Pueblo, it shall have the right to transport persons and property between any point on such line and Denver." There is certainly an inference from this proviso that it was not contemplated that the Chicago Company should acquire similar rights upon railways from other points than Pueblo. In addition to this, the situation and plan of the Denver station grounds show that while they possess every facility for the admission of trains from the southward, their connection with the Union Pacific to the northward is by two tracks, one of which is wholly used for the transfer of freight cars to other systems of railways, the other only making direct connection with the station of the Union Pacific — an obviously inadequate provision for a large and continuous traffic. Taking all the facts of this contract together, we regard it as quite clear that it was never intended to grant the use of terminal facilities except as appurtenant to the use of the road itself. Indeed, where a road is leased with its terminal facilities the implication is strong that it was the lease of the road which induced the lease of the terminals, and the contract should not be construed as importing a separate lease of such terminals without clear language to that effect.

If plaintiff's contention be correct, we see no reason why it may not construct or lease another track direct from Limon to Pueblo, and demand the use of the defendant's terminals at that point, and practically, at least, abandon its line to Colorado Springs.

Upon the whole, we think the defendant's construction of this contract is the correct one, and the decree of the court below in that particular should be affirmed.

(3) A question of some importance arises with regard to the proper construction of the exception, in the general granting clause, of the "shops at Burnham," the plaintiff claiming generally that the restriction applies only to the shop buildings and the land upon which they stand, and the defendant insisting that it includes all that portion of its property at Burnham west of the main line, consisting of about sixty acres purchased and mostly used for the construction, repairing and equipment of its rolling stock. The specific parcels of such property in dispute are, (*a*) about twenty acres south of the shop grounds proper, known as the Bailey tract, lying mostly to the west of the main line, which runs through the tract; (*b*) about six acres to the northward of the shops, and known as the Burlingame tract; (*c*) certain coach tracks within the yard occupied by the machine shops, and used by both parties for cleaning their passenger coaches; (*d*) a certain track known as the "wye" on the Bailey tract, and used for reversing the direction of the trains.

In ascertaining the scope of this exception little aid can be derived from the illustrations employed by counsel upon both sides, since the meaning of the reservation must be determined in every case by the particular facts of such case. For instance, if the vendor of a city lot should, in a deed of such lot, reserve to himself a building standing thereon, it would be manifest that he reserved only the right to remove such building, since a different construction would be destructive of the grant. On the other hand, if a testator devised to his sons a large farm, reserving to his widow the right to occupy the farm-house during her life, it might, and probably would, be held to include the out-buildings and gardens, or messuage.

So, while a shop in which an individual carried on a trade might be limited to the particular building, and even to the particular room in which his work was done, we should not apply this narrow construction to the shops in which a large railroad corporation carries on its manufacturing and repairing. The intent of the parties must be gathered from the character of the conveyance, the nature and situation of the property conveyed and of the property excepted, and the purpose of such exception.

The grant in this case was of the "possession and use of all its tracks, buildings, stations, sidings and switches on and along its line of railway between and including Denver and South Pueblo, . . . intending hereby to include in the description aforesaid all and every portion of its railway and appurtenant property between and at the points aforesaid," etc. No specific mention is here made of real estate, and while, as we have had recent occasion to hold, *New Orleans Pacific Railway* v. *Parker*, *ante*, 42, land is not ordinarily appurtenant to other land, much less to personal property, there can be no doubt that, under this grant, all land occupied by the stations, tracks, water tanks, etc., and all other land habitually used in the daily operation of the road, would pass as appurtenant to the railway. The very fact that the grant is so liberal in its terms is an indication that the exception also should not be narrowly construed. It is evident that an interpretation which would limit it to the buildings actually used for mechanical purposes would fail to express the intention of the parties with regard to this exception, since repairs are frequently made to cars while standing in the yards, and track room must be provided for cars while they are waiting their turn in the shops, as well as round-houses for the accommodation of locomotives. As the Denver Company owned and operated some fifteen hundred miles of railway, and had its principal shops for making and repairing its rolling stock, and for storing its cars, supplies and materials for its whole line of road, at Burnham, it is manifest that extensive buildings, grounds, tracks and other appliances would be required for such purposes. The amount originally purchased seems

to have been about forty acres; but finding this to be insufficient, from time to time other purchases were made, including the two tracts in question, and at the date of the contract the ground purchased for the use of the shops and intended to be devoted to such purposes embraced about sixty acres. There was a map of these lands published in 1884, entitled "A New Map of the Denver and Rio Grande *Railway shops at Burnham*," which it is probable, at least, was consulted by the parties before this contract was made. While there is some conflict of testimony as to what occurred at that time, it seems somewhat improbable that, in making a contract of this magnitude, some reference should not have been made to this map, a glance at which would have apprised plaintiff of what the defendant claimed to be embraced under the designation of the *Burnham shops*. For these reasons, we think that the plaintiff's theory that the exception applies only to the shop buildings is untenable.

With regard to the Bailey and Burlingame tracts, so called, it is at least doubtful whether they would have passed without the exception, as an appurtenance to the tracks, buildings, stations, sidings and switches, and other property of the road, unless, at least, they were occupied by tracks used in the operation of the road. Indeed, they are appurtenant rather to the shops than to the railway. It is clear they ought not to be detached from the shop grounds proper, with which they are connected, for which they were purchased, and of which they form a part. If these grounds were put to a separate use, distinct from the other shop grounds — a use connected with the customary operation of the road — a different question might arise.

There was no error in the decree providing that the plaintiff should not be excluded from the "wye" track at Burnham, for the turning of its engines, cars and trains, so long as it should continue to pay, for the use thereof, interest upon the cost of its construction, according to the arrangement made at the meeting of February 13, 1890, until the defendant should provide at Denver another similar track for the same purpose.

If there be any real dispute as to which is the "main line" contemplated in the 4th paragraph of the decree of the Circuit Court, it should be settled by an application to that court.

(4) Has the plaintiff a right, under the contract, to put into the Denver terminals its own switch engines, switching crews, and other employés devoted to its exclusive service? Soon after the parties entered upon the performance of this contract, a controversy arose between them respecting the employment of switching crews in the several yards of the defendant company. The plaintiff, believing that it could perform such service with its own engines and employés more economically than it was being done by the defendant, notified the defendant that it would, without unnecessary delay, place therein its own engines, agents and employés, who would perform such labor. Defendant promptly replied that it would not permit the employment of such agents, etc., and that, if any attempt were made by plaintiff to employ them, they would be ejected by force; assigning as a reason for such action that such operation of the yards would produce confusion and be attended by danger; and that the proximity of employés engaged by another company to those in its own service would create discontent and trouble between it and its own employés. Defendant subsequently consented to the employment by the plaintiff of certain classes of laborers in its yards at South Pueblo, but has persisted in its threat to exclude any one who should be introduced into the yard at Denver. Defendant justified its action upon the ground that such exclusive employment and service were not provided for by the contract, were in violation of its terms, and could not be permitted by reason of the danger to life and property, etc.

The contract is silent upon this point. The Denver Company does, however, agree (art. I, § 1) to let the Chicago Company into the full, equal, joint and perpetual possession and use of its property, and is bound to do so wherever a joint operation of such property is practicable. There is also a provision (art. II, § 2, sub. 6) for the payment by the Chicago Company, as part of the consideration, of "an amount equal to a proportionate share of the expenses actually incurred in paying

proper salaries to the general superintendent and subordinate employés, including switchmen, telegraph operators, train dispatchers and others necessarily employed in the performance of the duties incident to the joint use and occupation of said railway, not including train men, which proportion shall be ascertained in the manner . . . above set out." This provision seems to contemplate that the plaintiff shall employ its own operatives upon its own trains, the defendant retaining the general management of the road, and the direction of such employés as are necessary to its operation, and to the regular and ordinary movements of the trains of both companies, in order to prevent confusion and accidents.

This controversy with regard to the employment of switching crews was made the subject of a correspondence between the managers of the two companies early in 1889. On February 16, Mr. Smith, the manager of the defendant company, addressed the president of the plaintiff a letter in which he stated the defendant's construction of certain provisions of the contract, upon which he had taken the advice of its counsel, who, he says, in answer to a query of his, gave it as his opinion that the C. K. & N. Co. had the right, if it desired to do so, to do work in the Colorado Springs yards with its switch engines, and to do all the necessary switching for that company with its own engines; but that this could only be done under the direction and instructions of the superintendent or other designated officers of the defendant. "The same rule," said he, "applies to this case, as stated in query one, that all movement of engines, trains and cars, must be under the sole direction of the superintendent or designated officer of the" defendant. "There can be no divided authority with regard to the movement of engines, trains and cars. In this respect the yards at Pueblo, Colorado Springs and Denver are subject to the same principle."

In reply to this letter, under date of February 22, Mr. Cable, plaintiff's president, said that they acted on the theory "that the movement of trains on your tracks must be under the direction of your operating officers; that operations in the yards must conform to reasonable yard rules, and that in all

other respects we have exclusive control of our engines and cars." On the 26th, Mr. Smith said in reply: "This company is at all times ready and willing to unite with you in making and modifying rules and regulations for the movement of engines and trains in such a way as to accord equality of right, privilege and advantage as far as practicable. But in the execution of these rules and regulations there can be no divided authority." This was the construction put upon this contract by the parties shortly after it went into operation, and we think it accords with its spirit, and is not inconsistent with its letter. It is obviously necessary to the harmonious working of the two systems that the general control and management of the yard should remain with the defendant; but it is not easy to see why that control may not be as well exercised over two switching crews belonging to two different companies as over two crews belonging to the same company. The evidence shows that the defendant has nine crews working by day and six by night. There was a good deal of conflicting testimony upon the question whether such joint operation was practicable, and a large number of witnesses were sworn on both sides. Upon the whole, we have come to the conclusion that, while at times it may not be convenient, it is by no means impossible, and the correspondence between the parties indicates that it was not considered objectionable. The gist of the testimony upon this point seems to be that if the employés of the two companies desire to work harmoniously together there is little difficulty in doing so; but if either party chooses to be technical in the assertion of its rights, there is abundant opportunity for friction. It occurs to us that it would cause fully as much inconvenience to transfer the control of trains from the employés of one company to those of another, as such trains entered or left the terminal yard, as it would to permit the switching of such trains within the yard by the hands that brought them in or were to take them out. It appears that yards are jointly operated in this manner in such large railway centres as Kansas City, Toledo, and Chicago without serious difficulty. We think the same rule should also be applied to those employed in handling the

freight. With reference to this, the decree of the court below provided that the plaintiff had a right, at its option, to employ its separate switching crews, and operate its own switching engines in the yards of the defendant company, under the sole and absolute supervision, direction and control, however, of the yard master or other properly constituted officer or agent of the defendant, and subject to the orders and instructions of such yard master, etc., and in this there was no error.

(5) Defendant also assigns as error that portion of the decree adjudging that defendant should set apart a track at Denver on which the plaintiff should have the right to clean its cars, "and if no existing track can be conveniently devoted to that purpose, the defendant shall construct and equip a track therefor, at the joint expense of the parties, plaintiff and defendant." While the contract makes no express mention of car cleaning facilities, it is an obvious and necessary incident to the operation of railway trains; somehow and by somebody it must be done, and it is difficult to see, why, if the plaintiff is to be admitted to the joint possession and use of the entire railway and its appurtenant property, it can be excluded from such car cleaning facilities as the defendant possesses. If defendant desires to exclude plaintiff from such facilities as it possesses at the Burnham shops, it should provide them at some other convenient point. Unless a different arrangement can be made, it is proper that the actual work of cleaning cars should be done by the plaintiff with utensils provided by it; but the track facilities must be furnished by the defendant. If, however, the plaintiff is not satisfied with the facilities offered for this purpose, and desires further facilities and conveniences which do not now exist, it should proceed under art. III, § 1, of the contract, by giving notice to the defendant of its desire, and if the defendant, within thirty days after receiving such notice, neglects or refuses to construct such facilities, the plaintiff may construct the same and have the right to use and remove them during the term of the contract. The 5th paragraph of the decree should be modified to this extent.

(6) Plaintiff also assigns as error the omission of the court to provide in its decree that the defendant should discharge

any of its employés engaged in the operation of any part of the road jointly occupied and used under the contract, upon the demand of the plaintiff that such employé be removed from that portion of the line. In this particular the contract provides (art. III, § 3) that "any employé of one company engaged in the operation of any part of the railway jointly occupied and used under this contract, shall be removed from that portion of said line upon the request of the other." The allegation of the bill in that particular is, that for the purpose of facilitating the transportation of passengers from all points on one road to all points upon the other road, the plaintiff placed in the hands of station agents at the stations between Denver and Pueblo tickets to be sold to passengers who should desire such transportation, and that defendant uniformly and persistently thwarted, when it had power to do so, all attempts to secure the movement of traffic over such through line, and instructed such agents, who were paid for their services jointly by plaintiff and defendant, to refuse to sell such tickets, and to falsely state to passengers that plaintiff's trains would not stop at such stations; and that plaintiff demanded that a number of such agents, who made such statements, should be removed; but the contract in that particular was disregarded by the defendant. In its answer, the defendant admitted that plaintiff demanded that certain of its agents be removed, but alleged that such demand was made during the pendency of these proceedings, within a few days before the filing of the supplemental bill, and that such agents had not as yet been removed by reason of the manifest oversight of the plaintiff in ignoring its time tables and the instructions therein contained, and because it believed that upon a further consideration of the facts plaintiff would withdraw the request. This point was waived in the court below upon a statement of facts made as to the particular agents in the supplemental bill named, and while there seems to be a radical difference between the parties as to a proper interpretation of this clause of the contract, the question as here presented is only a moot one, and we do not feel called upon to settle it.

This disposes of all the errors assigned by counsel, and with

the modification of the 5th paragraph, above suggested, the decree of the court below will be

Affirmed, and the costs in this court divided.

MR. JUSTICE BREWER dissented, being of the opinion that the construction placed upon this contract by Mr. Justice Miller on the preliminary hearing in the Circuit Court was correct.

UNITED STATES v. TEXAS.

ORIGINAL.

No. 5. Original. Argued December 9, 1891. — Decided February 29, 1892.

The Supreme Court of the United States has original jurisdiction of a suit in equity brought by the United States against a State to determine the boundary between that State and a Territory of the United States, and that question is susceptible of judicial determination.

Although it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent, that principle has no application to a suit by one government against another government.

The exercise by this court of original jurisdiction in a suit brought by one State against another to determine the boundary line between them, or in a suit brought by the United States against a State to determine the boundary between a Territory of the United States and that State, so far from infringing, in either case, upon the sovereignty, is with the consent of the State sued.

A suit in equity being appropriate for determining the boundary between two States, the fact that the present suit is in equity, and not at law, is no valid objection to it.

IN EQUITY. The bill was filed by the Attorney General by direction of Congress, contained in section 25 of the act of May 2, 1890, 26 Stat. 81, 92, c. 182, "to provide a temporary government for the Territory of Oklahoma, to enlarge the jurisdiction of the United States Court in the Indian Territory, and for other purposes." That section was as follows:

"Sec. 25. That inasmuch as there is a controversy between the United States and the State of Texas as to the ownership

of what is known as Greer County, it is hereby expressly provided that this act shall not be construed to apply to said Greer County until the title to the same has been adjudicated and determined to be in the United States; and in order to provide for a speedy and final judicial determination of the controversy aforesaid, the Attorney General of the United States is hereby authorized and directed to commence in the name and on behalf of the United States, and prosecute to a final determination, a proper suit in equity in the Supreme Court of the United States against the State of Texas, setting forth the title and claim of the United States to the tract of land lying between the North and South Forks of the Red River where the Indian Territory and the State of Texas adjoin, east of the one hundredth degree of longitude, and claimed by the State of Texas as within its boundary and a part of its land, and designated on its map as Greer County, in order that the rightful title to said land may be finally determined; and the court, on the trial of the case may, in its discretion, so far as the ends of justice will warrant, consider any evidence heretofore taken and received by the Joint Boundary Commission under the act of Congress approved January thirty-first, eighteen hundred and eighty-five; and said case shall be advanced on the docket of said court, and proceeded with to its conclusion as rapidly as the nature and circumstances of the case permit."

The relief sought by the bill was the "determining and settling the true boundary line between the United States and the State of Texas, and to determine and put at rest questions which now exist as to whether the Prairie Dog Town Fork or the North Fork of Red River, as aforesaid, constitutes the true boundary line of the treaty of 1819."

The State of Texas answered and demurred to the bill assigning four causes of demurrer, only three of which were insisted upon at the argument, viz.:

"1. That it appears by the complainant's own showing by the said bill that she is not entitled to the relief prayed by the bill against this defendant, in that complainant seeks by her said bill to obtain from this court a decree judicially settling

and determining the true boundary line between the United States of America and the State of Texas, which question is political in its nature and character and not susceptible of judicial determination by this court in the exercise of its jurisdiction as conferred by the Constitution and laws of the United States.

"2. That it appears by the terms of complainant's bill that this is a suit by the United States of America against the State of Texas, and it is not competent, under the Constitution and laws of the United States of America, for said United States of America to sue one of its component States in her own courts. And especially is it true that said United States is not empowered under her Constitution and laws to sue the State of Texas, in a court of the United States, for the recovery of a right mutually claimed by the United States of America and the State of Texas, to wit, the ownership of certain designated territory, and the establishment of the boundary line between the respective governments."

"4. That this court sitting as a court of equity has no jurisdiction to hear and determine this controversy between complainant and defendant, because, as appears from complainant's bill and amended bill, complainant's cause of action is legal and not equitable, and that it is a suit or action to recover certain real property claimed by complainant and fully described in the bill of complaint; and if complainant has any right to recover, such right must be asserted, if at all, in a court of law and not in a court of equity as herein attempted. And this defendant further says that so much of the Act of Congress of May 2, 1890, under which this suit is brought, and which authorizes and directs the Attorney General of the United States to commence in this court in the name and on behalf of the United States and to prosecute to a final determination a proper suit in equity setting forth the title and claims of the United States to the tract of land in controversy, is unconstitutional and void in this, that it is not competent under the Constitution of the United States for the Congress of the United States to declare that a suit at law shall be a suit in equity, and that legal rights shall be tried

and determined in the courts of the United States as if they were equitable rights."

Mr. A. H. Garland for the State of Texas, in support of the demurrer. *Mr. John Hancock*, *Mr. George Clark*, *Mr. C. A. Culberson* and *Mr. H. J. May* were with him on the brief.

I. Before considering the demurrers it seems to us proper that the preliminary question should be called to the attention of the court whether the State of Texas is suable in this cause. As a State cannot be sued without its express consent the inquiry is whether the defendant has authorized this suit to be instituted and prosecuted against it. In our opinion it is not a matter of choice of tribunals or expediency of interposing the privilege of exemption from suit, but it involves the jurisdiction of the court, and upon it depends the validity of any decree which may be rendered. *Rhode Island* v. *Massachusetts*, 12 Pet. 657.

At no time has the State of Texas expressed its consent to this suit. Neither the executive nor any other officer has authority to consent that the State should be sued, and it does not appear that such authority has been conferred upon the governor by statute: so that, although an appearance has been entered, the question is still open whether the State is suable.

We do not overlook the settled rule that in cases in which a State shall be a party, in which this court has original jurisdiction, the adoption of the Constitution gave the consent of the States to be sued. *Rhode Island* v. *Massachusetts*, 12 Pet. 657; in this case, however, as we shall hereafter attempt to show, this provision of the Constitution is inapplicable. *United States* v. *Ferreira*, 13 How. 40, and note by Chief Justice Taney on page 52; *Florida* v. *Georgia*, 17 How. 478.

II. The first demurrer suggests not only that the question is in its nature political but that, contrary to the rule governing controversies between two States of the Union, it is such a political question that this court cannot judicially determine it in the exercise of the jurisdiction conferred by the Constitu-

tion. That a controversy respecting the boundary between two independent nations is a political and not a judicial question is well settled. A question like this respecting the boundaries of nations, is, as has been truly said, more a political than a legal question; and in its discussion the courts of every country must respect the pronounced will of the legislature. "The judiciary is not that department of the government to which the assertion of its interests against foreign powers is confided." *Foster* v. *Neilson*, 2 Pet. 253, 306; *Cherokee Nation* v. *Georgia*, 5 Pet. 1; *United States* v. *Arredondo*, 6 Pet. 691, 710; *Garcia* v. *Lee*, 12 Pet. 511.

This rule undoubtedly applied to the treaty of 1819 between the United States and Spain, to that of 1832 between the United States and Mexico and to that of 1838 between the United States and the Republic of Texas, when they were respectively ratified, and no reason is perceived why, after Texas was admitted into the Union, a different principle should control. The several treaties remain intact and are the contracts which define and regulate the relations of the contracting powers. *Wilson* v. *Wall*, 6 Wall. 83, 87.

So, also, the method or tribunal provided by the treaty for the settlement of differences arising thereunder must be resorted to; and as the treaties under consideration stipulate that the boundary shall be determined and marked by commissioners appointed by the respective powers, certainly not a judicial tribunal, it is evident that in its inception the question was political, to be adjusted according to the course of nations, and so remains. *Green* v. *Biddle*, 8 Wheat. 1; *United States* v. *Ferreira*, 13 How. 40.

But if the court shall be of opinion that this controversy, coming over from a time when the two governments were independent, is not a political question to be determined upon principles of law applicable to nations, but is analogous to boundary differences between States of the Union of which the court has original jurisdiction, (*Florida* v. *Georgia*, 17 How. 478; *Rhode Island* v. *Massachusetts*, 12 Pet. 657; *Alabama* v. *Georgia*, 23 How. 505, 510; *Virginia* v. *West Virginia*, 11 Wall. 39;) then it is submitted that the judicial power of the

United States, and especially the original jurisdiction of this court, does not extend to controversies between the United States and an individual State.

III. As to the contention embodied in the second ground of demurrer, the Constitution provides that the judicial power shall extend to controversies to which the "United States shall be a party;" to "controversies between two or more States;" "between a State and citizens of another State," and "between a State or the citizens thereof, and foreign States, citizens or subjects." The Supreme Court, by the clause immediately following, is given original jurisdiction only in "cases affecting Ambassadors, other public ministers and consuls, and those in which a State shall be a party." It is to be noticed that wherever a State is mentioned in the clause declaring the extent of the judicial power, the opposite party to the controversy is also mentioned and in no instance does it include the United States. In other words, the parties with whom the separate States can have legal controversies cognizable in the courts of the United States by reason of the parties thereto, are distinctly named and all others are necessarily excluded. Keeping in view the Eleventh Amendment, it has been justly said, so far as the present question is concerned, that the controversies over which the United States courts are given jurisdiction are "those to which the United States might be a party; those to which a State of the Union might be a party, *where the opposite party was another State of the Union.*" 2 Curtis Hist. Const. 444.

The clause establishing the judicial power is arranged by subjects and parties, carefully and accurately grouped, and the cases in which the United States shall be a party are distinctly separated from those in which a State may be. The cases of which this court has original jurisdiction are defined alone by reference to the parties and only two classes of cases are included, namely: those affecting ambassadors, other public ministers and consuls, and those in which a State, in cases over which the judicial power is by the preceding clause extended, shall be a party. In all the other cases mentioned the jurisdiction is declared to be appel-

late. It seems manifest to us, therefore, that the judicial power does not extend to controversies between the United States and an individual State, nor is the Supreme Court given original jurisdiction in such cases. In this connection, as strengthening this position and illustrating the purpose of the framers of the Constitution, it is worthy of mention that although it was proposed in the Convention to stretch the judicial power to all questions which "involve the national peace and harmony" and "all controversies *between the United States and an individual State* or the United States and the citizens of an individual State," neither of the propositions, in the breadth proposed, were adopted.

A more specific proposition to vest in the judiciary of the United States authority "to examine into and decide upon the claims of the *United States and an individual State to territory*" was peremptorily rejected. Mr. Justice Campbell in *Florida* v. *Georgia*, 17 How. 521.

That this court is without original jurisdiction in cases in which the United States shall be a party was held by Chief Justice Taney in a note to the case of the *United States* v. *Ferreira*, 13 How. 52. Subsequently, it is true, he delivered the opinion of the court in the case of *Florida* v. *Georgia*, 17 How. 478, in which the United States were permitted to adduce evidence in the controversy between Georgia and Florida, but neither the decision nor the opinion indicate a change of views on the subject. The opinion distinctly announces that the "court do not regard the United States, in this mode of proceeding, as either plaintiff or defendant; and they are, therefore, not liable to a judgment against them, nor entitled to a judgment in their favor."

The true rule on the subject is thus stated by Mr. Justice Curtis in his dissenting opinion in the above case, and it is not necessarily inconsistent, we think, with the opinion of the majority of the court:

"In distributing this jurisdiction, the Constitution has provided that, in all cases in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appel-

late jurisdiction. One of the other cases before mentioned, is a controversy to which the United States is a party.

"I am not aware that any doubt has ever been entertained by any one, that controversies to which the United States are a party, come under the appellate jurisdiction of this court in this distribution of jurisdiction by the Constitution. Such is the clear meaning of the words of the Constitution. So it was construed by the Congress, in the judiciary act of 1789, which, by the 11th section, conferred on the Circuit Courts jurisdiction of cases in which the United States are plaintiffs, and so it has been administered to this day. . . . We have, then, two rules given by the Constitution. The one, that if a State be a party, this court shall have original jurisdiction; the other, that if the United States be a party, this court shall have only appellate jurisdiction. And we are as clearly prohibited from taking original jurisdiction of a controversy to which the United States is a party, as we are commanded to take it if a State be a party. Yet, when the United States shall have been admitted on this record to become a party to this controversy, both a State and the United States will be parties to the same controversy. And if each of these clauses of the Constitution is to have its literal effect, the one would require and the other prohibit us from taking jurisdiction.

"It is not to be admitted that there is any real conflict between these clauses of the Constitution, and our plain duty is so to construe them that each may have its just and full effect. This is attended with no real difficulty. When, after enumerating the several distinct classes of cases and controversies to which the judicial power of the United States shall extend, the Constitution proceeds to distribute that power between the Supreme and inferior courts, it must be understood as referring, throughout, to the classes of cases before enumerated, as distinct from each other.

"And when it says: 'In all cases in which a State shall be a party, the Supreme Court shall have original jurisdiction,' it means, in all the cases before enumerated in which a State shall be a party. Indeed, it says so, in express terms, when it

speaks of the other cases where appellate jurisdiction is given.

"So that this original jurisdiction, which depends solely on the character of the parties, is confined to the cases in which are those enumerated parties, and those only.

"It is true, this course of reasoning leads necessarily to the conclusion that the United States cannot be a party to a judicial controversy with a State in any court.

"But this practical result is far from weakening my confidence in the correctness of the reasoning by which it has been arrived at. The Constitution of the United States substituted a government acting on individuals, in place of a confederation which legislated for the States in their collective and sovereign capacities. The continued existence of the States, under a republican form of government, is made essential to the existence of the national government. And the fourth section of the fourth article of the Constitution pledges the power of the nation to guarantee to every State a republican form of government; to protect each against invasion, and, on application of its legislature or executive, against domestic violence. This conservative duty of the whole towards each of its parts, forms no exception to the general proposition, that the Constitution confers on the United States powers to govern the people, and not the States.

"There is, therefore, nothing in the general plan of the Constitution, or in the nature and objects of the powers it confers, or in the relations between the general and state governments, to lead us to expect to find there a grant of power over judicial controversies between the government of the Union and the several States."

If this position be sound it necessarily follows that the act of Congress under which the suit is instituted is void. *Marbury* v. *Madison*, 1 Cranch, 137. *In re Metzger*, 5 How. 176.

IV. It is finally insisted, as ground of demurrer, and set out in the amended answer of defendant, "that this court sitting as a court of equity has no jurisdiction to hear and determine this controversy between complainant and defendant."

If it be true that the right asserted under the act of Con-

gress and set out in the bill is a legal and not an equitable right, there can be no doubt of the want of authority in Congress to direct its prosecution by proceedings in equity, for the distinction between legal and equitable rights and remedies is recognized by the Constitution. *Bennett* v. *Butterworth*, 11 How. 669; *Thompson* v. *Railroad Companies*, 6 Wall. 134; *Scott* v. *Neely*, 140 U. S. 106.

The right claimed by the United States in this case is the legal title to the body of land forming the county of Greer. It asserts this legal title, undertakes to trace it through solemn muniments and seeks to recover possession of the land.

The State of Texas also claims title to the land through the same treaties, and asserts its right of possession not only under said treaties, but under the reservation of ownership contained in the articles of annexation to the United States.

It is believed the cause of action as defined in the act and set out in the bill is legal and not equitable, and consequently the bill should be dismissed. *Lewis* v. *Cocks*, 23 Wall. 466; *Loker* v. *Rolle*, 3 Ves. Jr. 4; *Cavedo* v. *Billings*, 16 Florida, 261.

Mr. Edgar Allan (with whom was *Mr. Attorney General* on the brief) for the United States, opposing.

Mr. Justice Harlan delivered the opinion of the court.

This suit was brought by original bill in this court pursuant to the act of May 2, 1890, providing a temporary government for the Territory of Oklahoma. The 25th section recites the existence of a controversy between the United States and the State of Texas as to the ownership of what is designated on the map of Texas as Greer County, and provides that the act shall not be construed to apply to that county until the title to the same has been adjudicated and determined to be in the United States. In order that there might be a speedy and final judicial determination of this controversy the Attorney General of the United States was authorized and directed to commence and prosecute on behalf of the United States a

proper suit in equity in this court against the State of Texas, setting forth the title of the United States to the country lying between the North and South Forks of the Red River where the Indian Territory and the State of Texas adjoin, east of the one hundredth degree of longitude, and claimed by the State of Texas as within its boundary. 26 Stat. 81, 92, c. 182, § 25.

The State of Texas appeared and filed a demurrer, and, also, an answer denying the material allegations of the bill. The case is now before the court only upon the demurrer, the principal grounds of which are: That the question presented is political in its nature and character, and not susceptible of judicial determination by this court in the exercise of its jurisdiction as conferred by the Constitution and laws of the United States; that it is not competent for the general government to bring suit against a State of the Union in one of its own courts, especially when the right to be maintained is mutually asserted by the United States and the State, namely, the ownership of certain designated territory; and that the plaintiff's cause of action, being a suit to recover real property, is legal and not equitable, and, consequently, so much of the act of May 2, 1890, as authorizes and directs the prosecution of a suit in equity to determine the rights of the United States to the territory in question is unconstitutional and void.

The necessity of the present suit as a measure of peace between the General Government and the State of Texas, and the nature and importance of the questions raised by the demurrer, will appear from a statement of the principal facts disclosed by the bill and amended bill.

By a treaty between the United States and Spain, made February 22, 1819, and ratified February 19, 1821, it was provided:

"ART. 3. The boundary line between the two countries, west of the Mississippi, shall begin on the Gulph of Mexico, at the mouth of the river Sabine, in the sea, continuing north, along the western bank of that river, to the 32d degree of latitude; thence, by a line due north, to the degree of latitude where it strikes the Rio Roxo of Natchitoches or *Red River*;

then following the course of the Rio Roxo, westward, to the degree of longitude 100 west from London and 23 from Washington; then, crossing the said Red River, and running thence, by a line due north, to the river Arkansas; thence, following the course of the southern bank of the Arkansas, to its source, in latitude 42 north; and thence, by that parallel of latitude, to the South Sea. The whole being as laid down in Melish's map of the United States, published at Philadelphia, improved to the 1st of January, 1818. But, if the source of the Arkansas River shall be found to fall north or south of latitude 42, then the line shall run from the said source due south or north, as the case may be, till it meets the said parallel of latitude 42, and thence, along the said parallel, to the South Sea. All the islands in the Sabine, and the said Red and Arkansas Rivers, throughout the course thus described, to belong to the United States; but the use of the waters, and the navigation of the Sabine to the sea, and of the said rivers Roxo and Arkansas, throughout the extent of the said boundary, on their respective banks, shall be common to the respective inhabitants of both nations.

"The two high contracting parties agree to cede and renounce all their rights, claims and pretensions to the territories described by the said line; that is to say: the United States hereby cede to his Catholic Majesty, and renounce forever, all their rights, claims and pretensions, to the territories lying west and south of the above-described line; and in like manner, his Catholic Majesty cedes to the said United States, all his rights, claims and pretensions, to any territories east and north of the said line; and for himself, his heirs and successors, renounces all claim to the said territories forever." 8 Stat. 252, 254, 256, Art. 3.

For the purpose of fixing the line with precision, and of placing landmarks to designate the limits of both nations, it was stipulated that each appoint a commissioner and a surveyor, who should meet, before the end of one year from the ratification of the treaty, at Natchitoches, on the Red River, and run and mark the line "from the mouth of the Sabine to the Red River, and from the Red River to the River Arkan-

sas, and to ascertain the latitude of the source of the said river Arkansas, in conformity to what is above agreed upon and stipulated, and the line of latitude 42, to the South Sea;" making out plans and keeping journals of their proceedings, and the result to be considered as part of the treaty, having the same force as if it had been inserted therein. Art. 4, 8 Stat. 256.

At the date of the ratification of this treaty, the country now constituting Texas belonged to Mexico, part of the monarchy of Spain. Subsequently, in 1824, Mexico became a separate independent power, whereby the boundary line designated in the treaty of 1819 became the line between the United States and Mexico.

On the 12th of January, 1828, a treaty between the United States and Mexico was concluded, and subsequently, April 5, 1832, was ratified, whereby, as between those governments, the validity of the limits defined by the treaty of 1819 was confirmed. 8 Stat. 372.

By a treaty concluded April 25, 1838, between the United States and the Republic of Texas, which was ratified and proclaimed October 13, 1838, it was declared that the treaty of limits made and concluded in 1828 between the United States and Mexico "is binding upon the Republic of Texas." And in order to prevent future disputes and collisions in regard to the boundary between the two countries, as designated by the treaty of 1828, it was stipulated:

"ART. 1. Each of the contracting parties shall appoint a commissioner and surveyor, who shall meet before the termination of twelve months from the exchange of the ratifications of this convention, at New Orleans, and proceed to run and mark that portion of the said boundary which extends from the mouth of the Sabine, where that river enters the Gulf of Mexico, to the Red River. They shall make out plans and keep journals of their proceedings, and the result agreed upon by them shall be considered as part of this convention, and shall have the same force as if it were inserted therein. . . .

"ART. 2. And it is agreed that until this line is marked out as is provided for in the foregoing article, each of the con-

tracting parties shall continue to exercise jurisdiction in all territory over which its jurisdiction has hitherto been exercised, and that the remaining portion of the said boundary line shall be run and marked at such time hereafter as may suit the convenience of both the contracting parties, until which time each of the said parties shall exercise without the interference of the other, within the territory of which the boundary shall not have been so marked and run, jurisdiction to the same extent to which it has been heretofore usually exercised." 8 Stat. 511.

The treaty of 1838 had not been executed on the 1st day of March, 1845, when Congress, by joint resolution, consented that "the territory properly included within, and rightfully belonging to the Republic of Texas, may be erected into a new State" upon certain conditions. 5 Stat. 797. Those conditions having been accepted, Texas by a joint resolution of Congress passed December 29, 1845, was admitted into the Union on an equal footing with the original States in all respects whatever. 9 Stat. 108.

By an act of Congress, approved September 9, 1850, certain propositions were made on behalf of the United States to the State of Texas, to become obligatory upon the parties when accepted by Texas, if such acceptance was given on or before December 1, 1850. One of those propositions was that Texas would agree that its boundary on the north should commence at the point at which the meridian of one hundred degrees west from Greenwich is intersected by the parallel of thirty-six degrees thirty minutes north latitude, and run from that point due west to the meridian of one hundred and three degrees west from Greenwich, thence due south to the thirty-second degree of north latitude, thence on the parallel of thirty-two degrees of north latitude to the Rio Bravo de Norte, and thence with the channel of said river to the Gulf of Mexico; another, that Texas cede to the United States all her claim to territory exterior to the above limits and boundaries. In consideration of said establishment of boundaries, cession of claim to territory and relinquishment of claims, the United States agreed to pay to Texas the sum of ten mil-

lions of dollars in a stock bearing five per cent interest, and redeemable at the end of fourteen years, the interest payable half-yearly at the Treasury of the United States. 9 Stat. 446, c. 49.

By an act of assembly approved November 25, 1850, the above propositions were accepted by Texas, and it agreed to be bound by them according to their true import.

During the whole period of nearly forty years succeeding the treaty of 1819 no action, except as above indicated, was taken to settle the boundary line in question. But, in the year 1859, a joint commission on the part of the United States and Texas commenced the work of running that line, but separated without reaching any conclusion. Nevertheless, in 1860, the commissioner upon the part of the United States completed the work, without the coöperation of the commissioner of Texas, and reported the result to the General Land Office in 1861. According to the determination of the Commissioner on the part of the United States, and under certain surveys made from 1857 to 1859, pursuant to a contract between two persons named Jones and Brown and the Commissioner of Indian Affairs, the true dividing and boundary line between the United States and the United Mexican States began where the one hundredth meridian touched the main Red River aforesaid, running thence along the line or course of what is now known as the South Fork of the Red River or river of the treaty of 1819.

After the commissioners of the United States and Texas had failed to reach an agreement, the legislature of Texas, by an act approved February 8, 1860, declared, "that all the territory contained in the following limits, to wit: Beginning at the confluence of Red River and Prairie Dog River, thence running up Red River, passing the mouth of South Fork and following main or North Red River to its intersection with the twenty-third degree of west longitude; thence due north across Salt Fork and Prairie Dog River, and thence following that river to the place of beginning; be, and the same is hereby, created into a county to be known by the name and style of the county of Greer." And by acts of its officers,

proceeding under its statutes, Texas assumed and exercised control and jurisdiction of the territory constituting what is called the county of Greer.

Notwithstanding those assertions of control and jurisdiction, Texas, by an act approved May 2, 1882, made provision for running and marking the line in question. That act provided for the appointment by the governor of a suitable person or persons, who, in conjunction with such person or persons as might be appointed by or on behalf of the United States for the same purpose, should run and mark the boundary line between the Territories of the United States and the State of Texas, in order that "the question may be definitely settled as to the true location of the one hundredth degree of longitude west from London, and whether the North Fork of Red River, or the Prairie Dog Fork of said river, is the true Red River designated in the treaty between the United States and Spain, made February 22, 1819."

By an act of Congress, approved January 31, 1885, provision was made for the appointment of a commission by the President to act with the commission to be appointed by the State of Texas in ascertaining and marking the point where the one hundredth meridian of longitude crosses Red River, in accordance with the terms of the treaty of 1819; the person or persons so appointed to make report of his or their action in the premises to the Secretary of the Interior, who should transmit the same to Congress at its next session after the report was made. 23 Stat. 296, c. 47.

Under the last-mentioned acts a joint commission was organized, and it assembled at Galveston, Texas, on February 23, 1886. Being unable to agree as to whether the stream now known as the North Fork of the Red River, or that now called the South Fork or Main Red River, was the river referred to in the treaty of 1819, the joint commission adjourned *sine die* with the understanding that each commission would make its report to the proper authorities and await instructions. The commissioners on the part of the United States reported that "the Prairie Dog Town Fork is the true boundary, and that the monument should be placed at the intersec-

tion of the one hundredth meridian with this stream;" while the commission on the part of Texas reported that "the North Fork of Red River, as now named and delineated on the maps, is the Rio Roxo or Red River delineated on Melish's maps, described in the treaty of February 22, 1819, and is the boundary line of said treaty to the point where the one hundredth degree of west longitude crosses the same."

The United States claims to have jurisdiction over all the territory acquired by the treaty of 1819, containing 1,511,576.17 acres, between what has been designated as the Prairie Dog Town Fork, or Main Red River, and the North Fork of Red River, being the extreme portion of the Indian Territory lying west of the North Fork of the Red River, and east of the one hundredth meridian of west longitude from Greenwich; and that its right to said territory, so far from having been relinquished, has been continuously asserted from the ratification of the treaty of 1819 to the present time.

The bill alleges that the State of Texas, without right, claims, has taken possession of, and endeavors to extend its laws and jurisdiction over, the disputed territory, in violation of the treaty rights of the United States; that, during the year 1887, it gave public notice of its purpose to survey and place upon the market for sale, and otherwise dispose of, that territory; and that, in consequence of its proceeding to eject *bona fide* settlers from certain portions thereof, President Cleveland, by proclamation issued December 30, 1887, warned all persons, whether claiming to act as officers of the county of Greer, or otherwise, against selling or disposing of, or attempting to sell or dispose of, any of said lands, or from exercising or attempting to exercise any authority over them, and "against purchasing any part of said territory from any person or persons whatever." 25 Stat. 1483.

The relief asked is a decree determining the true line between the United States and the State of Texas, and whether the land constituting what is called "Greer County," is within the boundary and jurisdiction of the United States or of the State of Texas. The government prays that its rights, as asserted in the bill, be established, and that it have such other relief as the nature of the case may require.

In support of the contention that the ascertainment of the boundary between a Territory of the United States and one of the States of the Union is political in its nature and character, and not susceptible of judicial determination, the defendant cites *Foster* v. *Neilson*, 2 Pet. 253, 307, 309; *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 21; *United States* v. *Arredondo*, 6 Pet. 691, 711; and *Garcia* v. *Lee*, 12 Pet. 511, 517.

In *Foster* v. *Neilson*, which was an action to recover certain lands in Louisiana, the controlling question was as to whom the country between the Iberville and the Perdido rightfully belonged at the time the title of the plaintiff in that case was acquired. The United States, the court said, had perseveringly insisted that by the treaty of St. Ildefonso made October 1, 1800, Spain ceded the disputed territory as part of Louisiana to France, and that France by the treaty of Paris of 1803 ceded it to the United States. Spain insisted that the cession to France comprehended only the territory which at that time was denominated Louisiana. After examining various articles of the treaty of St. Ildefonso, Chief Justice Marshall, speaking for the court, said: "In a controversy between two nations concerning national boundary, it is scarcely possible that the courts of either should refuse to abide by the measures adopted by its own government. There being no common tribunal to decide between them, each determines for itself on its own rights, and if they cannot adjust their differences peaceably, the right remains with the strongest. The judiciary is not that department of the government to which the assertion of its interests against foreign powers is confided; and its duty commonly is to decide upon individual rights, according to those principles which the political departments of the nation have established. If the course of the nation has been a plain one, its courts would hesitate to pronounce it erroneous." Again: "After these acts of sovereign power over the territory in dispute, asserting the American construction of the treaty by which the government claims it, to maintain the opposite construction in its own courts would certainly be an anomaly in the history and practice of nations. If those departments which are entrusted with the foreign intercourse

of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied. A question like this respecting the boundaries of nations, is, as has been truly said, more a political than a legal question; and, in its discussion, the courts of every country must respect the pronounced will of the legislature."

In *United States* v. *Arredondo* the court, referring to *Foster* v. *Neilson*, said: "This court did not deem the settlement of boundaries a judicial but a political question — that it was not its duty *to lead, but to follow* the action of the other departments of the government." The same principles were recognized in *Cherokee Nation* v. *Georgia* and *Garcia* v. *Lee*.

These authorities do not control the present case. They relate to questions of boundary between independent nations, and have no application to a question of that character arising between the General Government and one of the States composing the Union, or between two States of the Union. By the Articles of Confederation, Congress was made "the last resort on appeal in all disputes and differences" then subsisting or which thereafter might arise "between two or more States concerning boundary, jurisdiction or any other cause whatever;" the authority so conferred to be exercised by a special tribunal to be organized in the mode prescribed in those Articles, and its judgment to be final and conclusive. Art. 9. At the time of the adoption of the Constitution there existed, as this court said in *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 723, 724, controversies between eleven States, in respect to boundaries, which had continued from the first settlement of the colonies. The necessity for the creation of some tribunal for the settlement of these and like controversies that might arise, under the new government to be formed, must, therefore, have been perceived by the framers of the Constitution, and, consequently, among the controversies to which the judicial power of the United States was extended

by the Constitution, we find those between two or more States. And that a controversy between two or more States, in respect to boundary, is one to which, under the Constitution, such judicial power extends, is no longer an open question in this court. The cases of *Rhode Island* v. *Massachusetts*, 12 Pet. 657; *New Jersey* v. *New York*, 5 Pet. 284, 290; *Missouri* v. *Iowa*, 7 How. 660; *Florida* v. *Georgia*, 17 How. 478; *Alabama* v. *Georgia*, 23 How. 505; *Virginia* v. *West Virginia*, 11 Wall. 39, 55; *Missouri* v. *Kentucky*, 11 Wall. 395; *Indiana* v. *Kentucky*, 136 U. S. 479; and *Nebraska* v. *Iowa*, *ante*, 359, were all original suits, in this court, for the judicial determination of disputed boundary lines between States. In *New Jersey* v. *New York*, 5 Pet. 284, 290, Chief Justice Marshall said: "It has then been settled by our predecessors, on great deliberation, that this court may exercise its original jurisdiction in suits against a State, under the authority conferred by the Constitution and existing acts of Congress." And in *Virginia* v. *West Virginia*, it was said by Mr. Justice Miller to be the established doctrine of this court "that it has jurisdiction of questions of boundary between two States of this Union, and that this jurisdiction is not defeated, because in deciding that question it becomes necessary to examine into and construe compacts or agreements between those States, or because the decree which the court may render, affects the territorial limits of the political jurisdiction and sovereignty of the States which are parties to the proceeding." So, in *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 287, 288; "By the Constitution, therefore, this court has original jurisdiction of suits brought by a State against citizens of another State, as well as of controversies between two States. . . . As to 'controversies between two or more States.' The most numerous class of which this court has entertained jurisdiction is that of controversies between two States as to the boundaries of their territory, such as were determined before the Revolution by the King in Council, and under the Articles of Confederation (while there was no national judiciary) by committees or commissioners appointed by Congress."

In view of these cases, it cannot, with propriety, be said that a question of boundary between a Territory of the United States and one of the States of the Union is of a political nature, and not susceptible of judicial determination by a court having jurisdiction of such a controversy. The important question therefore, is, whether this court can, under the Constitution, take cognizance of an original suit brought by the United States against a State to determine the boundary between one of the Territories and such State. Texas insists that no such jurisdiction has been conferred upon this court, and that the only mode in which the present dispute can be peaceably settled is by agreement, in some form, between the United States and that State. Of course, if no such agreement can be reached — and it seems that one is not probable — and if neither party will surrender its claim of authority and jurisdiction over the disputed territory, the result, according to the defendant's theory of the Constitution, must be that the United States, in order to effect a settlement of this vexed question of boundary, must bring its suit in one of the courts of Texas — that State consenting that its courts may be open for the assertion of claims against it by the United States — or that, in the end, there must be a trial of physical strength between the government of the Union and Texas. The first alternative is unwarranted both by the letter and spirit of the Constitution. Mr. Justice Story has well said: "It scarcely seems possible to raise a reasonable doubt as to the propriety of giving to the national courts jurisdiction of cases in which the United States are a party. It would be a perfect novelty in the history of national jurisprudence, as well as of public law, that a sovereign had no authority to sue in his own courts. Unless this power were given to the United States, the enforcement of all their rights, powers, contracts and privileges in their sovereign capacity would be at the mercy of the States. They must be enforced, if at all, in the state tribunals." Story Const. § 1674. The second alternative, above mentioned, has no place in our constitutional system, and cannot be contemplated by any patriot except with feelings of deep concern.

The cases in this court show that the framers of the Constitution did provide, by that instrument, for the judicial determination of all cases in law and equity between two or more States, including those involving questions of boundary. Did they omit to provide for the judicial determination of controversies arising between the United States and one or more of the States of the Union? This question is in effect answered by *United States* v. *North Carolina*, 136 U. S. 211. That was an action of debt brought in this court by the United States against the State of North Carolina, upon certain bonds issued by that State. The State appeared, the case was determined here upon its merits, and judgment was rendered for the State. It is true that no question was made as to the jurisdiction of this court, and nothing was therefore said in the opinion upon that subject. But it did not escape the attention of the court, and the judgment would not have been rendered except upon the theory that this court has original jurisdiction of a suit by the United States against a State. As, however, the question of jurisdiction is vital in this case, and is distinctly raised, it is proper to consider it upon its merits.

The Constitution extends the judicial power of the United States "to all cases, in law and equity, arising under this Constitution, the laws of the United States and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof and foreign States, citizens or subjects.

"In all cases, affecting ambassadors or other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such ex-

ceptions, and under such regulations as the Congress shall make." Art. 3, § 2. "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State." 11th Amendment.

It is apparent upon the face of these clauses that in one class of cases the jurisdiction of the courts of the Union depends "on the character of the cause, whoever may be the parties," and, in the other, on the character of the parties, whatever may be the subject of controversy. *Cohens* v. *Virginia*, 6 Wheat. 264, 378, 393. The present suit falls in each class, for it is, plainly, one arising under the Constitution, laws and treaties of the United States, and, also, one in which the United States is a party. It is, therefore, one to which, by the express words of the Constitution, the judicial power of the United States extends. That a Circuit Court of the United States has not jurisdiction, under existing statutes, of a suit by the United States against a State, is clear; for by the Revised Statutes it is declared — as was done by the Judiciary Act of 1789 — that "the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction." Rev. Stat. § 687; Act of September 24, 1789, c. 20, § 13; 1 Stat. 80. Such exclusive jurisdiction was given to this court, because it best comported with the dignity of a State, that a case in which it was a party should be determined in the highest, rather than in a subordinate judicial tribunal of the nation. Why then may not this court take original cognizance of the present suit involving a question of boundary between a Territory of the United States and a State?

The words, in the Constitution, "in all cases . . . in which a State shall be party, the Supreme Court shall have original jurisdiction," necessarily refer to all cases mentioned in the preceding clause in which a State may be made, of right, a party defendant, or in which a State may, of right, be

a party plaintiff. It is admitted that these words do not refer to suits brought against a State by its own citizens or by citizens of other States, or by citizens or subjects of foreign States, even where such suits arise under the Constitution, laws and treaties of the United States, because the judicial power of the United States does not extend to suits of *individuals* against States. *Hans* v. *Louisiana*, 134 U. S. 1, and authorities there cited; *North Carolina* v. *Temple*, 134 U. S. 22, 30. It is, however, said that the words last quoted refer only to suits in which a State is a party, and in which, also, the opposite party is another State of the Union or a foreign State. This cannot be correct, for it must be conceded that a State can bring an original suit in this court against a citizen of another State. *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 287. Besides, unless a State is exempt altogether from suit by the United States, we do not perceive upon what sound rule of construction suits brought by the United States in this court — especially if they be suits the correct decision of which depends upon the Constitution, laws or treaties of the United States — are to be excluded from its original jurisdiction as defined in the Constitution. That instrument extends the judicial power of the United States "to *all* cases," in law and equity, arising under the Constitution, laws and treaties of the United States, and to controversies in which the United States shall be a party, and confers upon this court original jurisdiction "in *all* cases" "in which a State shall be party," that is, in all cases mentioned in the preceding clause in which a State may, of right, be made a party defendant, as well as in all cases in which a State may, of right, institute a suit in a court of the United States. The present case is of the former class. We cannot assume that the framers of the Constitution, while extending the judicial power of the United States to controversies between two or more States of the Union, and between a State of the Union and foreign States, intended to exempt a State altogether from suit by the General Government. They could not have overlooked the possibility that controversies, capable of judicial solution, might arise between the United States and some

of the States, and that the permanence of the Union might be endangered if to some tribunal was not entrusted the power to determine them according to the recognized principles of law. And to what tribunal could a trust so momentous be more appropriately committed than to that which the people of the United States, in order to form a more perfect Union, establish justice and insure domestic tranquillity, have constituted with authority to speak for all the people and all the States, upon questions before it to which the judicial power of the nation extends? It would be difficult to suggest any reason why this court should have jurisdiction to determine questions of boundary between two or more States, but not jurisdiction of controversies of like character between the United States and a State.

Mr. Justice Bradley, speaking for the court in *Hans* v. *Louisiana*, 134 U. S. 1, 15, referred to what had been said by certain statesmen at the time the Constitution was under submission to the people, and said: "The letter is appealed to now, as it was then, as a ground for sustaining a suit brought by an individual against a State. . . . The truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States. Some things, undoubtedly, were made justiciable which were not known as such at the common law; such, for example, as controversies between States as to boundary lines, and other questions admitting of judicial solution. And yet the case of *Penn* v. *Lord Baltimore*, 1 Ves. Sen. 444, shows that some of these unusual subjects of litigation were not unknown to the courts even in colonial times; and several cases of the same general character arose under the Articles of Confederation, and were brought before the tribunal provided for that purpose in those articles. 131 U. S. App. 50. The establishment of this new branch of jurisdiction seemed to be necessary from the extinguishment of diplomatic relations between the States." That case, and others in this court relating to the suability of States, proceeded upon the broad ground that "it is inherent in the nature of sovereignty not

to be amenable to the suit of an *individual* without its consent."

The question as to the suability of one government by another government rests upon wholly different grounds. Texas is not called to the bar of this court at the suit of an individual, but at the suit of the government established for the common and equal benefit of the people of all the States. The submission to judicial solution of controversies arising between these two governments, "each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other," *McCulloch* v. *State of Maryland*, 4 Wheat. 316, 400, 410, but both subject to the supreme law of the land, does no violence to the inherent nature of sovereignty. The States of the Union have agreed, in the Constitution, that the judicial power of the United States shall extend to *all* cases arising under the Constitution, laws and treaties of the United States, without regard to the character of the parties, (excluding, of course, suits against a State by its own citizens or by citizens of other States, or by citizens or subjects of foreign States,) and equally to controversies to which the United States shall be a party, without regard to the subject of such controversies, and that this court may exercise original jurisdiction in all such cases, "in which a State shall be party," without excluding those in which the United States may be the opposite party. The exercise, therefore, by this court, of such original jurisdiction in a suit brought by one State against another to determine the boundary line between them, or in a suit brought by the United States against a State to determine the boundary between a Territory of the United States and that State, so far from infringing, in either case, upon the sovereignty, is with the consent of the State sued. Such consent was given by Texas when admitted into the Union upon an equal footing in all respects with the other States.

We are of opinion that this court has jurisdiction to determine the disputed question of boundary between the United States and Texas.

It is contended that, even if this court has jurisdiction, the

dispute as to boundary must be determined in an action at law, and that the act of Congress requiring the institution of this suit in equity is unconstitutional and void as, in effect, declaring that legal rights shall be tried and determined as if they were equitable rights. This is not a new question in this court. It was suggested in argument, though not decided, in *Fowler* v. *Lindsey*, 3 Dall. 411, 413. Mr. Justice Washington, in that case, said: "I will not say that a State could sue at law for such an incorporeal right as that of sovereignty and jurisdiction; but even if a court of law would not afford a remedy, I can see no reason why a remedy should not be obtained in a court of equity. The State of New York might, I think, file a bill against the State of Connecticut, praying to be quieted as to the boundaries of the disputed territory; and this court, in order to effectuate justice, might appoint commissioners to ascertain and report those boundaries." But the question arose directly in *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 734, which was a suit in equity in this court involving the boundary line between two States. The court said: "No court acts differently in deciding on boundary between States, than on lines between separate tracts of land; if there is uncertainty where the line is, if there is a confusion of boundaries by the nature of interlocking grants, the obliteration of marks, the intermixing of possession under different proprietors, the effects of accident, fraud or time or other kindred causes, it is a case appropriate to equity. An issue at law is directed, a commission of boundary awarded; or, if the court are satisfied without either, they decree what and where the boundary of a farm, a manor, a province or a State is and shall be." When that case was before the court at a subsequent term, Chief Justice Taney, after stating that the case was of peculiar character, involving a question of boundary between two sovereign States, litigated in a court of justice, and that there were no precedents as to forms and modes of proceedings, said: "The subject was however fully considered at January term, 1838, when a motion was made by the defendant to dismiss this bill. Upon that occasion the court determined to frame their proceedings according to those which had been

adopted in the English courts, in cases most analogous to this, where the boundaries of great political bodies had been brought into question. And, acting upon this principle, it was then decided, that the rules and practice of the Court of Chancery should govern in conducting this suit to a final issue. The reasoning upon which that decision was founded is fully stated in the opinion then delivered; and upon reëxamining the subject, we are quite satisfied as to the correctness of this decision." 14 Pet. 210, 256. The above cases, *New Jersey* v. *New York*, *Missouri* v. *Iowa*, *Florida* v. *Georgia*, *Alabama* v. *Georgia*, *Virginia* v. *West Virginia*, *Missouri* v. *Kentucky*, *Indiana* v. *Kentucky*, and *Nebraska* v. *Iowa*, were all original suits in equity in this court, involving the boundary of States. In view of these precedents, it is scarcely necessary for the court to examine this question anew. Of course, if a suit in equity is appropriate for determining the boundary between two States, there can be no objection to the present suit as being in equity and not at law. It is not a suit simply to determine the legal title to, and the ownership of, the lands constituting Greer County. It involves the larger question of governmental authority and jurisdiction over that territory. The United States, in effect, asks the specific execution of the terms of the treaty of 1819, to the end that the disorder and public mischiefs that will ensue from a continuance of the present condition of things may be prevented. The agreement, embodied in the treaty, to fix the lines with precision, and to place landmarks to designate the limits of the two contracting nations, could not well be enforced by an action at law. The bill and amended bill make a case for the interposition of a court of equity.

Demurrer overruled.

MR. CHIEF JUSTICE FULLER, with whom concurred MR. JUSTICE LAMAR, dissenting.

MR. JUSTICE LAMAR and myself are unable to concur in the decision just announced.

This court has original jurisdiction of two classes of cases

only, those affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party.

The judicial power extends to "controversies between two or more States;" "between a State and citizens of another State;" and "between a State or the citizens thereof, and foreign States, citizens or subjects." Our original jurisdiction, which depends solely upon the character of the parties, is confined to the cases enumerated, in which a State may be a party, and this is not one of them.

The judicial power also extends to controversies to which the United States shall be a party, but such controversies are not included in the grant of original jurisdiction. To the controversy here the United States is a party.

We are of opinion, therefore, that this case is not within the original jurisdiction of the court.

FIELD *v.* CLARK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BOYD *v.* UNITED STATES.

STERNBACH *v.* UNITED STATES.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Nos. 1052, 1049, 1050. Argued November 30, December 1, 2, 1891. — Decided February 29, 1892.

The signing by the Speaker of the House of Representatives and by the President of the Senate, in open session, of an enrolled bill, is an official attestation by the two Houses of such bill as one that has passed Congress; and when the bill thus attested receives the approval of the President, and is deposited in the Department of State according to law, its authentication as a bill that has passed Congress is complete and unimpeachable.

Statement of the Case.

It is not competent to show from the journals of either House of Congress, that an act so authenticated, approved and deposited, did not pass in the precise form in which it was signed by the presiding officers of the two Houses and approved by the President.

Congress cannot, under the Constitution, delegate its legislative power to the President.

The authority conferred upon the President by section 3 of the act of October 1, 1890, to reduce the revenue and equalize duties on imports, and for other purposes, 26 Stat. c. 1244, pp. 567, 612, to suspend by proclamation the free introduction of sugar, molasses, coffee, tea and hides, when he is satisfied that any country producing such articles imposes duties or other exactions upon the agricultural or other products of the United States, which he may deem to be reciprocally unequal or unreasonable, is not open to the objection that it unconstitutionally transfers legislative power to the President, (FULLER, C. J., and LAMAR, J., dissenting;) but even if it were it does not follow that other parts of the act imposing duties upon imported articles, are inoperative.

The court does not decide whether the provision in that act respecting bounties upon sugar (schedule E, Sugar, 26 Stat. 583) is or is not constitutional, because it is plain from the act that these bounties do not constitute a part of the system of customs duties imposed by the act, and it is clear that the parts of the act imposing such duties would remain in force even if these bounties were held to be unconstitutionally imposed.

Unless it be impossible to avoid it, a general revenue statute should never be declared inoperative in all its parts because a particular part, relating to a distinct subject, may be invalid.

THESE were suits by importers to obtain a refund of duties claimed to have been illegally exacted on imported merchandise under the tariff act approved October 1, 1890, 26 Stat. 567, c. 1244.

Marshall Field & Co. proceeded against John M. Clark, the collector of the port of Chicago, to recover duties paid on woollen dress goods, woollen wearing apparel and silk embroideries.

Boyd, Sutton & Co. proceeded against the United States and J. B. Erhardt, collector of the port of New York, to recover duties paid upon an importation of silk and cotton laces.

H. Herrman, Sternbach and Co. proceeded against the United States to recover duties paid upon colored cotton cloths.

The main issue in all the cases was, whether that act, which purports to repeal the previous tariff act of March 3, 1883, 22 Stat. 488, c. 121, had itself the force of law.

Argument of Mr. Bliss and Mr. Wilson for Appellants.

The facts which were presented in support of the contention that the bill never became a law in accordance with the provisions of the Constitution were three.

(1) That in engrossing the bill a clause known as section 30, relating to a rebate of taxes on tobacco, which was shown by the journals of both the House of Representatives and the Senate to have been regularly passed by both Houses of Congress, was omitted, and that the engrossed act, as attested by the Vice-President and the Speaker of the House, as approved by the President, and as deposited with the Secretary of State, was not the act which passed the two Houses of Congress, and was therefore not a statute of the United States in accordance with the provisions of the Constitution.

(2) That the first five paragraphs of Schedule E, section 1, of the act, providing for bounties to producers of American sugar (paragraphs 231 to 235), were unconstitutional and void, no power to enact legislation of this character having been vested in Congress by the Constitution.

(3) That section 3 of said act was unconstitutional and void, in that it delegates to the President the power of laying taxes and duties, which power, by sections 1 and 8 of article 1 of the Constitution, is vested in Congress.

As the court in its opinion, *post*, has set forth these several matters objected to at length, it is sufficient to refer to it for further details.

The judgment in each case in the court below was against the importer. In this court the three cases were argued together, but by separate counsel for the appellants in each case, each brief covering the whole case. In order not to go over the same ground three times, the arguments for appellants reported are: in No. 1052 on point (1); in No. 1049 on point (2); and in No. 1050 on point (3); that being the order in which the cases stand in the opinion of the court.

Mr. N. W. Bliss and *Mr. John P. Wilson* for Marshall Field & Co., appellants.

Where a bill, which passed both the House of Represent-

atives and the Senate, containing a clause which the Senate opposed, and receded from their opposition only after conference ordered, and which was engrossed and presented to and signed by the President, omitting the clause upon which the controversy between the two houses took place, it renders invalid not only the omitted section, but the entire act.

When a bill passed by one branch of the legislative body differs materially from the bill passed by the other branch, or when one branch wholly fails to pass it, or when the bill approved by the Executive is materially different from the bill passed by the two houses, it will be held to be a nullity. Cooley, Const. Lim. 6th ed. 183. This view of the law of the case at bar is sustained by the following cases: *Moody* v. *State*, 48 Alabama, 115; *State* v. *Mead*, 71 Missouri, 266; *Burritt* v. *Commissioners*, 120 Illinois, 322; *State* v. *Kiesewetter*, 45 Ohio St. 254; *Hunt* v. *State*, 22 Tex. App. 396; *Legg* v. *Annapolis*, 42 Maryland, 203; *Brady* v. *West*, 50 Mississippi, 68; *Larrison* v. *Railroad Co.*, 77 Illinois, 11; *Walnut* v. *Wade*, 103 U. S. 683; *Wenner* v. *Thornton*, 98 Illinois, 156; *Dow* v. *Beidelman*, 49 Arkansas, 325; *Smithee* v. *Campbell*, 41 Arkansas, 471; *Smithee* v. *Garth*, 33 Arkansas, 17; *Bound* v. *Wisconsin Central Railroad*, 45 Wisconsin, 543; *Meracle* v. *Down*, 64 Wisconsin, 323; *Wise* v. *Bigger*, 79 Virginia, 269; *People* v. *De Wolf*, 62 Illinois, 253; *Opinion of Justices*, 35 N. H. 579; *Moog* v. *Randolph*, 77 Alabama, 597; *Jones* v. *Hutchinson*, 43 Alabama, 721; *Sayre* v. *Pollard*, 77 Alabama, 608; *Stein* v. *Leeper*, 78 Alabama, 517; *State* v. *Liedtke*, 9 Nebraska, 462; *Berry* v. *Baltimore & Drum Point Railroad*, 41 Maryland, 446; *State* v. *Hagood*, 13 So. Car. 46.

In all these cases the decision was that the entire act is rendered void whenever there has been a material variance between the bill as passed and the bill as signed and approved. The same may be said of the whole list of cases decided with reference to their having an object or purpose not expressed in the title, under constitutions requiring that each bill have reference to but one subject, and more are included. In all such cases the entire acts have always been held void, and not merely the purpose unexpressed or the subject in excess, as

will appear in the following cases: *Callaghan* v. *Chipman*, 59 Michigan, 610; *Ragio* v. *State*, 86 Tennessee, 272; *Leach* v. *People*, 122 Illinois, 420; *People* v. *Beadle*, 60 Michigan, 22; *In re Blodgett*, 89 N. Y. 392; *Grover* v. *Ocean Grove Camp Meeting*, 45 N. J. Law (16 Vroom) 399; *State* v. *Barrett*, 27 Kansas, 213; *Madison County* v. *Baker*, 80 Indiana, 374.

Judge Cooley, after saying that "the bill as signed must be the same as it passed the two Houses," adds, that a clerical error that would not mislead may be overlooked, citing *People* v. *Onondaga*, 16 Michigan, 254, 256. In that case the law was passed by both Houses with a title authorizing the levying of a certain bounty tax. In engrossing it for the governor's approval by a clerical error the word *county* was substituted for *bounty* in the title; as by an inspection of the act itself which used the correct wording, the error was such as to correct itself, and no one could be *misled* by it, it was held not to invalidate the whole act, Cooley, J., saying, however: "I am not prepared to say that an act of the legislature can be valid which as engrossed for the signature of the governor would be void if passed by the legislature in that form. A law must have the concurrence of the three branches of the legislative department, and if it differs in an *essential particular* when presented to the governor for his signature from the bill as passed by the two Houses, there is difficulty in saying that it has been concurred in by all." See also *Prescott* v. *Canal Trustees*, 19 Illinois, 324; *Smith* v. *Hoyt*, 14 Wisconsin, 273.

These cases sufficiently indicate what Mr. Cooley means by a "clerical error that would not mislead." It cannot by any possibility refer to, or cover, the omission of a section, clause or proviso which is a material part of the act itself.

In the case at bar the omitted clause was an entire section of the original bill. It was such an important clause of the bill as to be the subject of contention between the two Houses. It was of such consequence that when found to have been omitted from the enrolled act it was enacted under a suspension of the rules at the succeeding session, as an independent law. Can it be possible, under the authorities cited, that the Board of General Appraisers were correct in holding in effect

that where a bill which is passed by the two Houses is in such different terms or varies so materially in substance and legal effect from that which is approved by the President, as in the case presented, there still exists such a legal and actual identity between the bill passed and the one approved as that the one approved acquires the force and validity of a constitutional enactment?

The act of October 1, 1890, was before the Board of Appraisers, and its constitutionality was challenged. If it was invalid for any reason, then the contention of appellants was correct, and the act of March 3, 1883, was in force. The act of October 1, 1890, largely increased the duties upon the goods of appellants, and imposed upon them greater burdens than were leviable under the act claimed by appellants to govern. With reference to the questions determining which law was in force, that creating the greater burdens, or that imposing the lesser tax, the Board of Appraisers was in serious doubt. The main question was, which burden was the citizen to bear, which tax to pay? What should have been the canon of construction in such a case? Justice Story in *United States* v. *Wigglesworth*, 2 Story, 373, says: "It is, I conceive, a general rule, in the interpretation of all statutes, levying taxes or duties upon subjects or citizens, not to extend their provisions by implication beyond the clear import of the language used, nor to enlarge their operations so as to embrace matter not specifically pointed out, although standing upon close analogy. In every case, therefore, of doubt, such statutes are construed most strongly against the government, and in favor of the subjects or citizens, because burdens are not to be imposed beyond what the statutes expressly and clearly import." See also Potter's Dwarris Stats. 235; *Tomkins* v. *Ashby*, 6 B. & C. 541; *Warrington* v. *Furbor*, 8 East, 242; *Gildart* v. *Gladstone*, 11 East, 675; *Kingston Dock Co.* v. *Browne*, 2 B. & Ad. 43; *Powers* v. *Barney*, 5 Blatchford, 203.

It is submitted that under the doctrines of the text books and decisions on this question, the moment a doubt was established as to which law governed, the former law, or the alleged law largely increasing duties, that moment should

have solved the doubt against the government, and in favor of the citizen who has the burden to bear, the money to pay: that the Board of Appraisers erred in affirming the decision of the collector of the port upholding an appraisement under an alleged act, largely increasing the burdens of taxation upon a citizen, when it was seriously in doubt whether the alleged act had been constitutionally enacted and become a valid law; which error was continued in the *pro forma* decision of the Circuit Court affirming the decision of the Board of Appraisers. See also *Gurr* v. *Scudds*, 11 Exch. 190; *Conroy* v. *Warren*, 3 Johns. Cas. 259; *S. C.* 2 Am. Dec. 156; *Wright* v. *Briggs*, 2 Hill, 77; *The Liverpool Hero*, 2 Gallison, 184; *Adams* v. *Bancroft*, 3 Sumner, 384; *Richardson* v. *Emswiler*, 14 La. Ann. 658; *Chase* v. *New York Central Railroad*, 26 N. Y. 352.

Nor can the omitted clause be held to be trivial. The House proposed the bill reducing the tax and, as a condition, consideration and compensation for such reduction, by a clause connected therewith and dependent thereon, provided for a rebate. The Senate struck out the condition, the House adhered to it, the Senate receded from its action, and the bill passed. Is it conceivable that the House would have passed the part of the section reducing the tax, without the rebate clause? They refused to do it. They intended that the execution of their act reducing the tax should be tempered by the rebate clause, and this became the intent of the act as passed by the two Houses. How then can the legislative intent in this regard be carried into effect, with this clause expunged? It seems too plain to argue that it cannot. It therefore comes directly within the principle that it is only when the remainder is capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, that it is capable of being sustained.

In *Allen* v. *Louisiana*, 103 U. S. 80, 83, Chief Justice Waite said: "It is an elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that if the parts are wholly independent of each other that which is constitutional may stand, while that which is unconstitu-

tional will be rejected. 'But' as was said by Chief Justice Shaw, in *Warren* v. *Mayor and Aldermen of Charlestown*, 2 Gray, 84, 'If they are so mutually connected with and dependent on each other as conditions, considerations or compensations for each other as to warrant a belief that the legislature intended them as a whole and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected must fall with them.' The point to be determined is, whether the unconstitutional provisions are so connected with the general scope of the law as to make it impossible if they are stricken out, to give effect to what appears to have been the intent of the legislature." The principle governing these decisions, as enunciated by Chief Justice Shaw in this case, has been universally cited with approval and followed. The application of it to the case at bar under the decisions quoted seems perfect. The same doctrine is held in *Eckhart* v. *State*, 5 West Va. 515; *Tillman* v. *Cocke*, 9 Baxter, 429; *Meyer* v. *Berlandi*, 39 Minnesota, 438; *State* v. *Sank County*, 62 Wisconsin, 376; *State* v. *Hanger*, 5 Arkansas, 412; *Thorne* v. *Cramer*, 15 Barb. 112; *Parker* v. *Commonwealth*, 6 Penn. St. 507; *S. C.* 47 Am. Dec. 480; *Meshmeier* v. *State*, 11 Indiana, 482; *Lathrop* v. *Mills*, 19 California, 513; *State* v. *Copeland*, 3 R. I. 33; *State* v. *Sinks*, 42 Ohio St. 345; *State* v. *Pugh*, 43 Ohio St. 98; *Rader* v. *Union Township*, 39 N. J. Law (10 Vroom) 509; *Flanagan* v. *Plainfield*, 44 N. J. Law (15 Vroom) 118; *W. U. Tel. Co.* v. *State*, 62 Texas, 630; *Childs* v. *Shower*, 18 Iowa, 261; *Union Pacific Railroad* v. *Atchison*, 28 Kansas, 453; *Moore* v. *New Orleans*, 32 La. Ann. 726.

Mr. W. Wickham Smith (with whom was *Mr. Charles Curie* on the brief) for Boyd, Sutton & Co., appellants.

Section 3 of the act commonly called the "reciprocity section" is unconstitutional because it is a delegation of legislative power to the executive. It delegates to the President the power to determine, as to the five articles therein specified: (1) From what countries they must pay duty; (2) When they

shall begin to pay it; (3) How long they shall continue to pay it. The only point not left to his discretion is the amount to be paid. The Constitution, Art. 1, sec. 8, says: *The Congress* shall have power to lay and collect taxes, duties, imports and excises.

One of the settled maxims in constitutional law is that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority there it must remain; and by the constitutional agency alone the laws must be made until the constitution itself is changed. Cooley Const. Lim. c. 11, p. 137.

It would seem that if there was any class of laws to which this principle should be strictly applied it is tax laws; laws by which the government puts forth its strong arm to take the property of the citizen from him to apply to its own purposes, or, as in this act, to bounties. No power conferred upon the legislature should be more jealously guarded or more cautiously or more scrupulously exercised. Yet here we have a law which delegates to the President of the United States the power, by a mere stroke of his pen, to impose an onerous and burdensome tax on articles, all of which are the subject of daily consumption by the people of the whole country, some of which cannot be produced here, and none of which can be produced here in sufficient quantities to supply the people's needs. It delegates to him the power of determining when to tax them and how long to tax them. On these questions his judgment, wisdom and patriotism are substituted for that of the people's representatives.

It has been sought to defend this power on the ground that laws have frequently been passed to take effect upon the happening of a future event, and that such legislation has been pronounced constitutional. Without discussing the soundness of such judicial decisions, it is sufficient to say that such cases are not parallel to the one now under consideration. A law may take effect on the happening of a future event. An event is a *fact*. The question whether it has or has not happened is one which anybody can readily determine. No exercise of judgment or wisdom is necessary. It is a matter of simple

intelligence. All questions that involve judgment and discretion are passed upon by the legislature. But in the case of this law, none of such questions were passed upon by the Congress. They were all committed to the wisdom, discretion and patriotism of the President.

A case much relied on in support of this section is *The Brig Aurora* v. *The United States*, 7 Cranch, 382.

There are three reasons why this case should have little weight as an authority: (1) It was decided at a very early date, before the principles of constitutional government had received the consideration and discussion which they have since received: (2) The point does not seem to have been carefully considered. At any rate the bare conclusion is stated without any exposition of the principles involved, and with no statement of the reasons on which it is based. Such cases are seldom deemed entitled to be considered as authoritative except on the precise question involved: (3) The power delegated to the President by the act then under consideration was not a taxing power; but the determination of the question whether a European government had so modified its edicts as to cease to violate neutral commerce. While this involved a certain amount of judgment, it was not such an abdication of legislative functions as that in section 3 of the Tariff Act. The power there delegated to the President was almost a war power, conferred at a time when our relations with England and France were strained, and relating to a subject which two years later involved us in a war with England. The power now conferred upon the President is a taxing power conferred at a time when we are at peace with all the world. See *Thorne* v. *Cramer*, 15 Barb. 112; *S. C.* 47 Am. Dec. 480; *Rice* v. *Foster*, 4 Harrington (Del.) 479; *State* v. *Simons*, 32 Minnesota, 540; *Ex parte Wall*, 48 California, 279; *State* v. *Hudson County Commissioners*, 37 N. J. Law (8 Vroom) 12; *State* v. *Swisher*, 17 Texas, 441; *Clark* v. *Mobile*, 67 Alabama, 217; *Grim* v. *Weissenberg School District*, 57 Penn. St. 433; *S. C.* 98 Am. Dec. 237; *Brodhead* v. *Milwaukee*, 19 Wisconsin, 624; *State* v. *Weir*, 33 Iowa, 134; *Farnsworth Co.* v. *Lisbon*, 62 Maine, 451; *Willis* v. *Owen*, 43 Texas, 41.

Argument of Mr. Clarke and Mr. E. B. Smith for Appellants.

We submit that a statute which delegates to the executive the discretion to determine when and for how long and on what portion of the importations of a particular article (according to the country of its growth or production) a tax shall be levied, according to his judgment and discretion as to the fairness and justice of it, fixing only the amount of such tax when levied, is an unconstitutional delegation of the taxing power.

The incorporation in this act of the unconstitutional delegation of the taxing power in section 3, renders the whole act void.

This section relates to the same subject matter as the main portion of the bill, viz.: taxes on imports. It is an essential part of the scheme contemplated by said act. It was certainly one of the conditions and compensations for various other parts of the bill, for it recites substantially that the free introduction into the United States of sugar, molasses, coffee, tea and hides was enacted with a view to securing reciprocal trade with countries producing those articles and for that purpose.

Can the court believe that Congress would have passed this act without this section? The answer is, Congress refused to do so. This section was not in the bill as it passed the House. It was incorporated as an amendment by the Senate. The House refused to concur in the amendment. The Senate insisted on it. The Conference Committee of the two Houses retained it with an amendment simply as to the time of its taking effect. How then can it be said as matter of law that the act would have been passed without it? It is a matter of public knowledge that it was regarded at the time, and has been since, as one of the vital parts of the bill.

Mr. Edwin B. Smith and *Mr. Stephen G. Clarke* for H. Herrman, Sternbach & Co., appellants.

Application of the principles and decisions of this court to the provisions found in paragraphs 231 to 236 of Schedule E of this act, giving a bounty to the producers of native sugar, manifest their unconstitutionality. Certainly, there is no more constitutional authority for paying men to tap a maple

and boil its sap, or to raise cane, than there is to raise hay, potatoes, corn or cabbage. If the taxes constituting the funds in the national treasury can be collected and disbursed to compensate a man for making sugar, they can be for making brick or any other manufacture. There can be, in such case, no limit to the extent to which moneys raised by taxation can be appropriated to the individual benefit of preferred citizens, and in the encouragement of their private enterprises and to their personal gain. *Loan Association* v. *Topeka*, 20 Wall. 655; *Jarrolt* v. *Moberly*, 103 U. S. 580; *United States* v. *New Orleans*, 98 U. S. 381; *Ralls County* v. *United States*, 105 U. S. 733; *Parkersburg* v. *Brown*, 106 U. S. 487; *Cole* v. *La Grange*, 113 U. S. 1.

Wherever state courts have had occasion to pass upon this question, it has been answered in the same way. *Allen* v. *Jay*, 60 Maine, 124; *Hooper* v. *Emery*, 14 Maine, 375; *Weismer* v. *Douglas*, 64 N. Y. 91; *Brewer Brick Co.* v. *Brewer*, 62 Maine, 62; *Farnsworth Co.* v. *Lisbon*, 62 Maine, 451; *Ohio Valley Iron Works* v. *Moundsville*, 11 West Virginia, 1; *Trustees Channel Co.* v. *Central Pacific Railroad*, 51 California, 269; *Curtis* v. *Whipple*, 24 Wisconsin, 350; *Bissell* v. *Kankakee*, 64 Illinois, 248; *State* v. *Osawkee*, 14 Kansas, 418; *State* v. *Nemaha Co.*, 7 Kansas, 542; *McConnell* v. *Hamm*, 16 Kansas, 228; *State* v. *Foley*, 30 Minnesota, 350.

The relation between the government and the citizen, *as a tax-payer*, is that the latter's property is, *pro tanto*, taken for the *direct* support of the former — not for the benefit of any fellow-citizens individually. *Pray* v. *Northern Liberties*, 31 Penn. St. 69; *Sharpless* v. *Mayor*, 21 Penn. St. 147; *S. C.* 59 Am. Dec. 759; *In re Mayor*, 11 Johns. 77; *Wynehamer* v. *People*, 13 N. Y. 375.

Many cases besides those above cited treat such legislation as void, because a violation of natural right, independent of constitutions. *Calder* v. *Bull*, 3 Dall. 386: *Wilkinson* v. *Leland*, 2 Pet. 627; *Osborn* v. *Nicholson*, 13 Wall. 654; *Gunn* v. *Barry*, 15 Wall. 610; *Bartemeyer* v. *Iowa*, 18 Wall. 129.

The connection of parts in this statute is such that the avoidance of any material provision which received executive approval must nullify the whole.

Citations for Appellees.

It is a substitute for Title XXXIII of the Revised Statutes, as the act of 1883 is wholly superseded thereby.

It constitutes one connected system, arranged with relation to its several parts; constituting a statutory embodiment of what is known in English legislative parlance as the budget; or the result of an examination made to determine the amount of estimated revenues, needed to meet estimated requirements.

There is a mutual relation and interdependence between the duties upon woollen goods and upon wool; between the bounty upon domestic sugar and the placing of foreign upon the free list, and the latter's conditional subjection to duty, at the will of the President.

Mr. Attorney General and *Mr. Solicitor General* for appellees. To the Government's brief was attached an appendix containing a list of the authorities, by States, upon the question whether the legislative journals could be used to impeach the completely enrolled act, duly recorded and authenticated. This list is printed in the margin.[1]

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[1] *Alabama.* — In Alabama it is held that the validity of the seeming acts may be inquired into, and the presumption from due enrolment overthrown by the journals. *Dew* v. *Cunningham*, 28 Ala. 466; *Jones* v. *Hutchinson*, 43 Ala. 721; *Moody* v. *The State*, 48 Ala. 115; *State* v. *Buckley*, 54 Ala. 599; *Harrison* v. *Gordy*, 57 Ala. 49; *Perry County* v. *Railroad Co.*, 58 Ala. 546; *Walker* v. *Griffith*, 60 Ala. 361; *Moog* v. *Randolph*, 77 Ala. 597; *Sayre* v. *Pollard*, 77 Ala. 608: *Abernathy* v. *The State*, 78 Ala. 411; *Stein* v. *Leeper*, 78 Ala. 517; *Hall* v. *Steele*, 82 Ala. 562.

Arkansas. — In Arkansas the journals control the enrolled act. *Burr* v. *Ross*, 19 Ark. 250; *Vinsant* v. *Knox*, 27 Ark. 266; *English* v. *Oliver*, 28 Ark. 317; *State* v. *Little Rock & Texas Railway*, 31 Ark. 701; *Worthen* v. *Badgett*, 32 Ark. 496; *Smithee* v. *Garth*, 33 Ark. 17; *State* v. *Crawford*, 35 Ark. 237; *Chicot County* v. *Davies*, 40 Ark. 200; *Smithee* v. *Campbell*, 41 Ark. 471; *Webster* v. *Little Rock*, 44 Ark. 536; *Davis* v. *Gaines*, 48 Ark. 370; *Dow* v. *Beidelman*, 49 Ark. 325; *Glidewell* v. *Martin*, 51 Ark. 559.

It is noticeable that in the last case and in two previous cases, the judges delivering the opinions intimate a wish that the English rule were in force.

California. — In California the rulings have been various.

In *Fowler* v. *Peirce*, 2 Cal. 165, the court permitted oral evidence to be introduced to show that an act was approved by the governor after adjournment. This case was overruled in *Sherman* v. *Story*, 30 Cal. 253, where it was held that the enrolled act could not be impeached by the journals.

Opinion of the Court.

MR. JUSTICE HARLAN delivered the opinion of the court.

Duties were assessed and collected, according to the rates established by what is known as the Tariff Act of October 1,

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This was followed in *People* v. *Burt*, 43 Cal. 560. After these two cases were decided a new constitution was adopted in California, under which the journals have been examined to impeach the enrolled bill. *County of San Mateo* v. *So. Pac. Railroad*, 8 Sawyer, 238; *Weill* v. *Kenfield*, 54 Cal. 111; *Oakland Paving Co.* v. *Hilton*, 69 Cal. 479; *People* v. *Dunn*, 80 Cal. 211.

Colorado. — In Colorado the journals control the enrolled act. *In re Roberts*, 5 Col. 525; *Hughes* v. *Felton*, 11 Col. 489.

Connecticut. — In Connecticut the journals cannot be used to impeach the recorded act. *Eld* v. *Gorham*, 20 Conn. 8.

Dakota Territory. — In *Dakota Territory ex rel.* v. *O'Connor*, 5 Dak. 397, it was held that the certificate of the presiding officers to the passage of the bill would not be overthrown by the mere silence of the journals. The question of a conflict between the enrolled act and the journals was not considered.

Delaware. — We have found no cases in this State in which the question is raised.

Florida. — In this State the journal may be resorted to to impeach the enrolled act. *State* v. *Brown*, 20 Fla. 407; *State* v. *Deal*, 24 Fla. 293.

Georgia. — So far as our examination has extended, there are no cases on the subject in Georgia.

Idaho. — No cases found on the subject.

Illinois. — In this State the journals control in any conflict between them and the enrolled act as to the validity thereof. *Spangler* v. *Jacoby*, 14 Ill. 297; *Turley* v. *Logan County*, 17 Ill. 151; *People* v. *Hatch*, 19 Ill. 283; *Prescott* v. *Ill. & Mich. Canal Trustees*, 19 Ill. 324; *Schuyler County* v. *People ex rel.*, 25 Ill. 181; *People* v. *Starne*, 35 Ill. 121; *Wabash &c. Railroad* v. *Hughes*, 38 Ill. 174; *Illinois Central Railroad* v. *Wren*, 43 Ill. 77; *Bedard* v. *Hall*, 44 Ill. 91; *Grob* v. *Cushman*, 45 Ill. 119; *People* v. *DeWolf*, 62 Ill. 253; *Hensoldt* v. *Petersburg*, 63 Ill. 157; *Ryan* v. *Lynch*, 68 Ill. 160; *Happel* v. *Brethauer*, 70 Ill. 166; *Miller* v. *Goodwin*, 70 Ill. 659; *Plummer* v. *The People*, 74 Ill. 361; *Larrison* v. *Peoria &c. Railroad Co.*, 77 Ill. 11; *Binz* v. *Weber*, 81 Ill. 288; *People* v. *Loewenthal*, 93 Ill. 191; *Wenner* v. *Thornton*, 98 Ill. 156; *Burritt* v. *Commissioners of State Contracts*, 120 Ill. 332; *Leach* v. *The People*, 122 Ill. 420; *South Ottawa* v. *Perkins*, 94 U. S. 260; *Walnut* v. *Wade*, 103 U. S. 683; *Ohio* v. *Frank*, 103 U. S. 697; *Post* v. *Supervisors*, 105 U. S. 667.

Indiana. — In Indiana now, the journals do not control the enrolled act. Formerly they were consulted for the purpose of impeaching the act. The journals were referred to in *Skinner* v. *Deming*, 2 Ind. 558; *Coleman* v. *Dobbins*, 8 Ind. 156; *McCulloch* v. *The State*, 11 Ind. 424; *Coburn* v. *Dodd*, 14 Ind. 347.

The rule was changed and the enrolled act held conclusive of its valid

1890, on woollen dress goods, woollen wearing apparel and silk embroideries, imported by Marshall Field & Co.; on silk

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passage. *Evans* v. *Browne*, 30 Ind. 514; *Bender* v. *The State*, 53 Ind. 254; *Edger* v. *Board of Commissioners of Randolph County*, 70 Ind. 331; *State* v. *Denny*, 21 N. E. Rep. 252.

Iowa. — In Iowa the enrolled act in the Secretary of State's office is held to be the ultimate proof of the law. *Clare* v. *The State*, 5 Iowa, 510; *Duncombe* v. *Prindle*, 12 Iowa, 1.

Where the validity of a constitutional amendment was in question, as different provisions of the constitution applied, it was held that the journals could be consulted. *Koehler & Lange* v. *Hill*, 60 Iowa, 543.

Kansas. — In Kansas the enrolled act is controlled by the journals. *Haynes* v. *Heller*, 12 Kans. 384, Reporter's note; *Division of Howard County*, 15 Kans. 194; *Leavenworth County Commissioners* v. *Higginbotham*, 17 Kans. 62; *Prohibitory Amendment Cases*, 24 Kans. 700; *State* v. *Francis*, 26 Kans. 724; *In re Vanderberg*, 28 Kans. 243; *Weyand* v. *Stover*, 35 Kans. 545; *Kansas* v. *Robertson*, 41 Kans. 200.

Kentucky. — In Kentucky the question has not been squarely decided whether the journals in a conflict would overcome the presumption of the enrolled act, but the intimations of the court are that it would. *Commonwealth* v. *Jackson*, 5 Bush, 680; *Auditor* v. *Haycroft*, 14 Bush, 284.

Louisiana. — In this State it is held that the enrolled act is conclusive. *The Louisiana State Lottery Co.* v. *Richoux*, 23 La. Ann. 743; *Whited* v. *Lewis*, 25 La. Ann. 568.

Maine. — In this State the enrolled act is held to be the best evidence, and not to be overcome by the journals where its record is complete. *Weeks* v. *Smith*, 81 Me. 538.

Maryland. — In this State the enrolled act was at first held to be conclusive. Afterwards the decisions are that it may be impeached by the journals. The first series of cases is: *Fouke* v. *Fleming*, 13 Md. 392; *Mayor etc. of Annapolis* v. *Harwood*, 32 Md. 471.

Under a new constitution the following cases held that the enrolled act might be impeached by the journals and other evidence: *Berry* v. *Baltimore & Drum Point Railroad*, 41 Md. 446; *Legg* v. *Annapolis*, 42 Md. 203; *Strauss* v. *Heiss*, 48 Md. 292.

Massachusetts. — In this State no cases have been found bearing on the subject.

Michigan. — In this State the enrolled act is controlled by the entries on the journals. *Southworth* v. *Palmyra & Jackson Railroad*, 2 Gibbs, 287; *Green* v. *Graves*, 1 Douglass, 351; *Hurlbut* v. *Britain*, 2 Douglass, 191; *People* v. *Mahaney*, 13 Mich. 481; *People* v. *Onondaga County Supervisors*, 16 Mich. 254; *Steckert* v. *East Saginaw*, 22 Mich. 104; *Pack* v. *Barton*, 47 Mich. 520; *Attorney General* v. *Joy*, 55 Mich. 94; *Callaghan* v. *Chipman*, 59 Mich. 610; *Attorney General* v. *Rice*, 64 Mich. 385; *People ex rel. Hart* v. *McElroy*, 72 Mich. 446; *Sackrider* v. *Saginaw County Supervisors*, 79 Mich. 59; *Stow* v. *Grand*

and cotton laces imported by Boyd, Sutton & Co.; and on colored cotton cloths imported by Herrman, Sternbach & Co. 26 Stat. 567, c. 1244, § 1.

Rapids, 79 Mich. 595; *Rode* v. *Phelps*, 80 Mich. 598; *Caldwell* v. *Ward*, 83 Mich. 13; *People ex rel.* v. *Burch*, 84 Mich. 408.

Minnesota. — In this State it is held that the journals control the enrolled act. *Supervisors* v. *Heenan*, 2 Minn. 330; *State* v. *Hastings*, 24 Minn. 78; *Burt* v. *Winona & St. Peter Railroad*, 31 Minn. 472; *Minnesota* v. *Peterson*, 38 Minn. 143; *Lincoln* v. *Haugan*, 45 Minn. 451.

Mississippi. — In this State the enrolled act is held conclusive. In one case a different rule was laid down, namely, in the case of *Brady* v. *West*, 50 Miss. 68. The case was overruled. The following cases hold the law conclusive: *Green* v. *Weller*, 32 Miss. 650; *Green* v. *Weller*, 33 Miss. 735; *Swann* v. *Buck*, 40 Miss. 268; *Ex parte Wren*, 63 Miss. 512.

Missouri. — In this State the enrolled act was at first held conclusive, though where an amendment to the constitution was in question, the journals were consulted. *State* v. *McBride*, 4 Mo. 303.

The following case held the enrolled act to be conclusive: *Pacific R. R.* v. *The Governor*, 23 Mo. 353.

Upon the change of the constitution the legislative journals have been allowed to impeach the recorded act. *Bradley* v. *West*, 60 Mo. 33; *State* v. *Mead*, 71 Mo. 266.

Montana. — In this State no cases have been found on the subject.

Nebraska. — In this State the journals are used to impeach the enrolled act. *Hull* v. *Miller*, 4 Neb. 503; *State* v. *Liedtke*, 9 Neb. 462; *Cottrell* v. *The State*, 9 Neb. 125; *Ballou* v. *Black*, 17 Neb. 389; *State* v. *McLelland*, 18 Neb. 236; *State ex rel. Poole* v. *Robinson*, 20 Neb. 96; *In re Groff*, 21 Neb. 647; *State* v. *Van Duyn*, 24 Neb. 586.

Nevada. — In this State the enrolled act is held conclusive. *State* v. *Swift*, 10 Nev. 176; *State* v. *Rogers*, 10 Nev. 250; *State* v. *Glenn*, 18 Nev. 34.

In *State ex rel. Stevenson* v. *Tufly*, 19 Nev. 391, where the constitution required an amendment to be entered in full on the journals, an amendment was held invalid because the requirement was not complied with.

New Hampshire. — In this State the enrolled act is controlled by the journals. *Opinions of the Justices*, 35 N. H. 579; *Opinions of the Justices*, 45 N. H. 607; *Opinions of the Justices*, 52 N. H. 622.

New Jersey. — In this State the enrolled act is held to be the most appropriate evidence of the law, and is not overcome by inconsistent entries in the journals. *Pangborn* v. *Young*, 32 N. J. Law, 29; *Freeholders of Passaic County* v. *Stevenson*, 46 N. J. Law, 173; *Standard Underground Cable Co.* v. *The Attorney General*, 46 N. J. Eq. 270.

New York. — In New York the Revised Statutes (1 Rev. Stats. 187, sections 10 and 11) provided that the Secretary of State should receive the enrolled act, and should endorse upon it the day, month and year when the same became a law, and that his certificate should be conclusive of the

The importers severally protested against the assessment upon the ground that the act was not a law of the United

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facts stated therein. There was also a provision that no bill should be deemed to be passed by the assent of two-thirds of the members, unless the fact was certified by the presiding officer of each house. The question arose in a number of cases whether certain acts had been passed which were acts of incorporation and were required by the constitution of New York to be adopted by a two-thirds vote. It was held that, for the purpose of ascertaining the vote, recourse might be had to the original enrolled act on file in the Secretary of State's office, and that the absence of the certificate of the presiding officers to a two-thirds vote avoided the act. *Thomas* v. *Dakin*, 22 Wend. 9; *Warner* v. *Beers*, 23 Wend. 103; *Hunt* v. *Van Alstyne*, 25 Wend. 603; *People* v. *Purdy*, 2 Hill, 31; *Purdy* v. *People*, 4 Hill, 384; *De Bow* v. *People*, 1 Denio, 9; *Commercial Bank of Buffalo* v. *Sparrow*, 2 Denio, 97.

It was also stated by one or two judges in a *semble* (*Warner* v. *Beers*, 23 Wend. 125; *People* v. *Purdy*, 4 Hill, 384; *De Bow* v. *People*, 1 Denio, 14) that the journals might also be examined, but these dicta have not been followed. The present law in New York is that the journals cannot be consulted to determine whether an act has been passed by the requisite vote. *People* v. *Chenango County Supervisors*, 8 N. Y. 317; *People* v. *Devlin*, 33 N. Y. 269, 283; *People* v. *Marlborough Highway Commissioners*, 54 N. Y. 276.

In the case of *People* v. *Petrea*, 92 N. Y. 128, where the constitution required that all acts, like the act in question, to be valid must be reported by a commission, it was held that the journal might be resorted to to show that the act was not reported by the commission. This view grew out of a peculiar provision of the constitution, and does not take New York out of the line of those States which hold that the enrolled act cannot be impeached by entries upon the journals.

North Carolina. — In North Carolina it is held that the enrolled act is conclusive. *Broadnax* v. *Groom*, 64 N. C. 244; *State ex rel. Scarborough* v. *Robinson*, 81 N. C. 409.

Ohio. — In this State the journals are permitted to control the enrolled act. *State* v. *Moffitt*, 5 Ohio, 358; *Miller* v. *The State*, 3 Ohio St. 475; *Fordyce* v. *Godman*, 20 Ohio St. 1; *Herron* v. *Smith*, 44 Ohio St. 348; *State* v. *Kiesewetter*, 45 Ohio St. 254.

Oregon. — In this State the journals control the enrolled act. *Mumford* v. *Sewall*, 11 Ore. 67, 71; *State* v. *Wright*, 14 Ore. 365.

Pennsylvania. — In this State, while the question is not clearly settled, the tendency of the decisions is towards the conclusiveness of the enrolled act. *Speer* v. *Plank Road Co.*, 22 Penn. St. 376; *Southwark Bank* v. *The Commonwealth*, 26 Penn. St. 446; *Kilgore* v. *Magee*, 85 Penn. St. 401; *Commonwealth* v. *Martin*, 107 Penn. St. 185.

In *Southwark Bank* v. *The Commonwealth*, the journals were consulted to determine which of two bills passed first. In *Commonwealth* v. *Martin*, the

States. Upon appeal to the Board of General Appraisers under the act of June 10, 1890, known as the Customs Administrative Act, the decision of the collector in each case was approved, c. 407, secs. 14, 15, 26 Stat. 131, 137. The judg-

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presiding judge of the lower court declined to look into the journals, following *Pangborn* v. *Young*, and the case was decided by the Supreme Court without examining the journals.

Rhode Island. — In this State we have found no cases on the subject.

South Carolina. — In this State the journals are permitted to control the presumption from the enrolled act. *State* v. *Platt*, 2 S. C. 150; *State* v. *Smalls*, 11 S. C. 262; *Walker* v. *South Carolina*, 12 S. C. 200; *State* v. *Hagood*, 13 S. C. 46.

Tennessee. — In Tennessee the journals are permitted to control the presumption from the enrolled act. *State* v. *McConnell*, 3 Lea, 332; *Gaines* v. *Horrigan*, 4 Lea, 608; *Williams* v. *The State*, 6 Lea, 549; *Brewer* v. *Huntingdon*, 86 Tenn. 732; *State* v. *Algood*, 87 Tenn. 163.

Texas. — In Texas the enrolled act is held to be the best evidence and is not controlled by the journals. *Central Pacific Railway* v. *Hearne*, 32 Texas, 546; *Blessing* v. *Galveston*, 42 Texas, 641; *Houston & Texas Central Railway* v. *Odum*, 53 Texas, 343; *Day Land & Cattle Co.* v. *The State*, 68 Texas, 526; *Usener* v. *The State*, 8 Texas App. 177; *Hunt* v. *The State*, 22 Texas App. 396; *Ex parte Tipton*, 28 Texas App. 438.

In *Hunt* v. *The State*, *supra*, the journals were examined, but *Ex parte Tipton* practically overrules that case, and restores to authority *Usener* v. *The State*, which held the enrolled act conclusive.

Vermont. — In this State there is no decision by the Supreme Court of the State. Judge Prentiss, of the United States District Court, *In the matter of Wellman*, 20 Vermont, 656, expressed the opinion that the enrolled act was the only proper evidence, not only of its existence as a law, but of the time of its commencement, "though it may be necessary and admissible in some instances, particularly when an act becomes a law by not being signed or returned with objections, or by being returned and repassed by Congress, to carry back the inquiry to the legislative journals."

Virginia. — In this State the enrolled act is not conclusive, and the journals are permitted to control the presumption therefrom. *Wise* v. *Biggar*, 79 Va. 269.

Washington. — In this State we have found no cases on the subject.

West Virginia. — In this State the enrolled act is controlled by entries upon the journals. *Osborn* v. *Staley*, 5 W. Va. 85.

Wisconsin. — In this State the presumption from the enrolled act is controlled by the journals. *Watertown* v. *Cady*, 20 Wis. 501; *Bound* v. *Wisconsin Central Railroad Co.*, 45 Wis. 543; *Meracle* v. *Down*, 64 Wis. 323.

Wyoming. — In this State the presumption from the enrolled act is controlled by the journals. *Brown* v. *Nash*, 1 Wyo. 85; *Union Pacific Railroad* v. *Carr*, 1 Wyo. 96.

ment of the board having been affirmed by the Circuit Courts of the United States in the respective districts in which these matters arose, the cases have been brought here for review.

The appellants question the validity of the act of October 1, 1890, upon three grounds to be separately examined.

First. The seventh section of article one of the Constitution of the United States provides: "All bills for raising revenue shall originate in the House of Representatives, but the Senate may propose or concur with amendments as on other bills.

"Every bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his objections to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If, after such reconsideration, two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and, if approved by two-thirds of that house, it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

"Every order, resolution or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill."

The Revised Statutes provide that "whenever a bill, order, resolution or vote of the Senate and House of Representatives,

having been approved and signed by the President, or not having been returned by him with his objections, becomes a law or takes effect, it shall forthwith be received by the Secretary of State from the President; and whenever a bill, order, resolution or vote is returned by the President with his objections, and, on being reconsidered, is agreed to be passed, and is approved by two-thirds of both houses of Congress, and thereby becomes a law or takes effect, it shall be received by the Secretary of State from the President of the Senate or Speaker of the House of Representatives in whichsoever house it shall last have been so approved, and he shall carefully preserve the originals." Sec. 204.

The original enrolled act in question, designated on its face "H. R. 9416," was received at the Department of State October 1, 1890, and, when so received, was attested by the signatures of Thomas B. Reed, Speaker of the House of Representatives, and Levi P. Morton, Vice-President of the United States and President of the Senate, and had thereon these endorsements:

"Approved October 1st, 1890. BENJ. HARRISON."

"I certify that this act originated in the House of Representatives. "EDW. MCPHERSON, *Clerk*."

It is made the duty of the Secretary of State to furnish to the Congressional Printer "a correct copy of every act and joint resolution, as soon as possible after its approval by the President, or after it has become a law in accordance with the Constitution without such approval." That duty was performed by the Secretary of State with respect to the act in question, and the act appears in the volume of statutes published and distributed under the authority of the United States. Rev. Stat. §§ 210, 3803, 3805, 3807, 3808.

The contention of the appellants is, that this enrolled act, in the custody of the Secretary of State, and appearing, upon its face, to have become a law in the mode prescribed by the Constitution, is to be deemed an absolute nullity, in all its parts, because — such is the allegation — it is shown by the

Congressional record of proceedings, reports of committees of each house, reports of committees of conference, and other papers printed by authority of Congress, and having reference to house bill 9416, that a section of the bill, as it finally passed, was not in the bill authenticated by the signatures of the presiding officers of the respective houses of Congress, and approved by the President. The section alleged to have been omitted was as follows:

"SEC. 30. That on all original and unbroken factory packages of smoking and manufactured tobacco and snuff, held by manufacturers or dealers at the time the reduction herein provided for shall go into effect, upon which the tax has been paid, there shall be allowed a drawback or rebate of the full amount of the reduction, but the same shall not apply in any case where the claim has not been presented within sixty days following the date of reduction; and such rebate to manufacturers may be paid in stamps at the reduced rate; and no claim shall be allowed or drawback paid for a less amount than five dollars. It shall be the duty of the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, to adopt such rules and regulations and to prescribe and furnish such blanks and forms as may be necessary to carry this section into effect. For the payment of the rebates provided for in this section there is hereby appropriated any money in the Treasury not otherwise appropriated."

The argument, in behalf of the appellants, is, that a bill, signed by the Speaker of the House of Representatives and by the President of the Senate, presented to and approved by the President of the United States, and delivered by the latter to the Secretary of State, as an act passed by Congress, does not become a law of the United States if it had not in fact been passed by Congress. In view of the express requirements of the Constitution the correctness of this general principle cannot be doubted. There is no authority in the presiding officers of the House of Representatives and the Senate to attest by their signatures, nor in the President to approve, nor in the Secretary of State to receive and cause to be published, as a legislative act, any bill not passed by Congress.

But this concession of the correctness of the general principle for which the appellants contend does not determine the precise question before the court; for it remains to inquire as to the nature of the evidence upon which a court may act when the issue is made as to whether a bill, originating in the House of Representatives or the Senate, and asserted to have become a law, was or was not passed by Congress. This question is now presented for the first time in this court. It has received, as its importance required that it should receive, the most deliberate consideration. We recognize, on one hand, the duty of this court, from the performance of which it may not shrink, to give full effect to the provisions of the Constitution relating to the enactment of laws that are to operate wherever the authority and jurisdiction of the United States extend. On the other hand, we cannot be unmindful of the consequences that must result if this court should feel obliged, in fidelity to the Constitution, to declare that an enrolled bill, on which depend public and private interests of vast magnitude, and which has been authenticated by the signatures of the presiding officers of the two houses of Congress, and by the approval of the President, and been deposited in the public archives, *as an act of Congress*, was not in fact passed by the House of Representatives and the Senate, and therefore did not become a law.

The clause of the Constitution upon which the appellants rest their contention that the act in question was never passed by Congress is the one declaring that "each house shall keep a journal of its proceedings, and from time to time publish the same, except such parts as may in their judgment require secrecy; and the yeas and nays of the members of either house on any question shall, at the desire of one-fifth of those present, be entered on the journal." Art. 1, sec. 5. It was assumed in argument that the object of this clause was to make the journal the best, if not conclusive, evidence upon the issue as to whether a bill was, in fact, passed by the two houses of Congress. But the words used do not require such interpretation. On the contrary, as Mr. Justice Story has well said, "the object of the whole clause is to insure publicity

to the proceedings of the legislature, and a correspondent responsibility of the members to their respective constituents. And it is founded in sound policy and deep political foresight. Intrigue and cabal are thus deprived of some of their main resources, by plotting and devising measures in secrecy. The public mind is enlightened by an attentive examination of the public measures; patriotism, and integrity, and wisdom obtain their due reward; and votes are ascertained, not by vague conjecture, but by positive facts. . . . So long as known and open responsibility is valuable as a check or an incentive among the representatives of a free people, so long a journal of their proceedings and their votes, published in the face of the world, will continue to enjoy public favor and be demanded by public opinion." 1 Story, Constitution, §§ 840, 841.

In regard to certain matters, the Constitution expressly requires that they shall be entered on the journal. To what extent the validity of legislative action may be affected by the failure to have those matters entered on the journal, we need not inquire. No such question is presented for determination. But it is clear that, in respect to the particular mode in which, or with what fulness, shall be kept the proceedings of either house relating to matters not expressly required to be entered on the journals; whether bills, orders, resolutions, reports and amendments shall be entered at large on the journal, or only referred to and designated by their titles or by numbers; these and like matters were left to the discretion of the respective houses of Congress. Nor does any clause of that instrument, either expressly or by necessary implication, prescribe the mode in which the fact of the original passage of a bill by the House of Representatives and the Senate shall be authenticated, or preclude Congress from adopting any mode to that end which its wisdom suggests. Although the Constitution does not expressly require bills that have passed Congress to be attested by the signatures of the presiding officers of the two houses, usage, the orderly conduct of legislative proceedings and the rules under which the two bodies have acted since the organization of the government, require that mode of authentication.

The signing by the Speaker of the House of Representatives, and by the President of the Senate, in open session, of an enrolled bill, is an official attestation by the two houses of such bill as one that has passed Congress. It is a declaration by the two houses, through their presiding officers, to the President, that a bill, thus attested, has received, in due form, the sanction of the legislative branch of the government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass Congress shall be presented to him. And when a bill, thus attested, receives his approval, and is deposited in the public archives, its authentication as a bill that has passed Congress should be deemed complete and unimpeachable. As the President has no authority to approve a bill not passed by Congress, an enrolled act in the custody of the Secretary of State, and having the official attestations of the Speaker of the House of Representatives, of the President of the Senate, and of the President of the United States, carries, on its face, a solemn assurance by the legislative and executive departments of the government, charged, respectively, with the duty of enacting and executing the laws, that it was passed by Congress. The respect due to coequal and independent departments requires the judicial department to act upon that assurance, and to accept, as having passed Congress, all bills authenticated in the manner stated: leaving the courts to determine, when the question properly arises, whether the act, so authenticated, is in conformity with the Constitution.

It is admitted that an enrolled act, thus authenticated, is sufficient evidence of itself — nothing to the contrary appearing upon its face — that it passed Congress. But the contention is, that it cannot be regarded as a law of the United States if the journal of either house fails to show that it passed in the precise form in which it was signed by the presiding officers of the two houses, and approved by the President. It is said that, under any other view, it becomes possible for the Speaker of the House of Representatives and the President of the Senate to impose upon the people as a law a bill that was never passed by Congress. But this possibility is too remote

to be seriously considered in the present inquiry. It suggests a deliberate conspiracy to which the presiding officers, the committees on enrolled bills and the clerks of the two houses must necessarily be parties, all acting with a common purpose to defeat an expression of the popular will in the mode prescribed by the Constitution. Judicial action based upon such a suggestion is forbidden by the respect due to a coördinate branch of the government. The evils that may result from the recognition of the principle that an enrolled act, in the custody of the Secretary of State, attested by the signatures of the presiding officers of the two houses of Congress, and the approval of the President, is conclusive evidence that it was passed by Congress, according to the forms of the Constitution, would be far less than those that would certainly result from a rule making the validity of Congressional enactments depend upon the manner in which the journals of the respective houses are kept by the subordinate officers charged with the duty of keeping them.

The views we have expressed are supported by numerous adjudications in this country, to some of which it is well to refer. In *Pangborn* v. *Young*, 32 N. J. Law (3 Vroom) 29, 37, the question arose as to the relative value, as evidence of the passage of a bill, of the journals of the respective houses of the legislature and the enrolled act authenticated by the signatures of the speakers of the two houses and by the approval of the governor. The bill there in question, it was alleged, originated in the house and was amended in the Senate, but, as presented to and approved by the governor, did not contain all the amendments made in the Senate. Referring to the provision in the constitution of New Jersey, requiring each house of the legislature to keep a journal of its proceedings — which provision is in almost the same words as the above clause quoted from the Federal Constitution — the court, speaking by Chief Justice Beasley, said that it was impossible for the mind not to incline to the opinion that the framers of the Constitution, in exacting the keeping of the journals, did not design to create records that were to be the ultimate and conclusive evidence of the conformity of

legislative action to the constitutional provisions relating to the enactment of laws. In the nature of things, it was observed, these journals must have been constructed out of loose and hasty memoranda made in the pressure of business and amid the distractions of a numerous assembly. The Chief Justice said: "Can any one deny that, if the laws of the State are to be tested by a comparison with these journals, so imperfect, so unauthenticated, that the stability of all written law will be shaken to its very foundation? Certainly no person can venture to say that many of our statutes, perhaps some of the oldest and most important, those which affect large classes of persons or on which great interests depend, will not be found defective, even in constitutional particulars, if judged by this criterion. . . . In addition to these considerations, in judging of consequences, we are to remember the danger under the prevalence of such a doctrine to be apprehended from the intentional corruption of evidences of this character. It is scarcely too much to say that the legal existence of almost every legislative act would be at the mercy of all persons having access to these journals; for it is obvious that any law can be invalidated by the interpolation of a few lines or the obliteration of one name and the substitution of another in its stead. I cannot consent to expose the state legislation to the hazards of such probable error or facile fraud. The doctrine contended for on the part of the evidence has no foundation, in my estimation, on any considerations of public policy." The conclusion was, that upon grounds of public policy, as well as upon the ancient and well settled rules of law, a copy of a bill bearing the signatures of the presiding officers of the two houses of the legislature and the approval of the governor, and found in the custody of the Secretary of State, was conclusive proof of the enactment and contents of a statute, and could not be contradicted by the legislative journals or in any other mode. These principles were affirmed by the New Jersey Court of Errors and Appeals in *Freeholders of Passaic* v. *Stevenson*, 46 N. J. Law (17 Vroom) 173, 184, and in *Standard Underground Co.* v. *Attorney General*, 46 N. J. Eq. (1 Dickinson) 270, 276.

In *Sherman* v. *Story*, 30 California, 253, 275, the whole subject was carefully considered. The court, speaking through Mr. Justice Sawyer, said: "Better, far better, that a provision should occasionally find its way into the statute through mistake, or even fraud, than that every act, state and national, should at any and all times be liable to be put in issue and impeached by the journals, loose papers of the legislature and parol evidence. Such a state of uncertainty in the statute laws of the land would lead to mischiefs absolutely intolerable. . . . The result of the authorities in England and in the other States clearly is, that, at common law, whenever a general statute is misrecited, or its existence denied, the question is to be tried and determined by the court as a question of law — that is to say, the court is bound to take notice of it, and inform itself the best way it can; that there is no plea by which its existence can be put in issue and tried as a question of fact; that if the enrollment of the statute is in existence, the enrollment itself is the record, which is conclusive as to what the statute is, and cannot be impeached, destroyed or weakened by the journals of Parliament or any other less authentic or less satisfactory memorials; and that there has been no departure from the principles of the common law in this respect in the United States, except in instances where a departure has been grounded on, or taken in pursuance of, some express constitutional or statutory provision requiring some relaxation of the rule, in order that full effect might be given to such provisions; and in such instances the rule has been relaxed by judges with great caution and hesitation, and the departure has never been extended beyond an inspection of the journals of both branches of the legislature." The provisions of the California constitution, in force when the above case was decided, relating to the journals of legislative proceedings, were substantially like the clause upon that subject in the Constitution of the United States. The doctrines of the above case were reaffirmed in *People* v. *Burt*, 43 California, 560. But it should be observed that at a subsequent date a new constitution was adopted in California, under which the journals have been examined to impeach an

enrolled bill. *County of San Mateo* v. *Southern Pacific Railroad Co.*, 8 Sawyer, 238, 294.

A case very much in point is *Ex parte Wren*, 63 Mississippi, 512, 527, 532. The validity of a certain act was there questioned on the ground that, although signed by the presiding officers of the two houses of the legislature, and approved by the governor, it was not law, because it appeared from the journals of those bodies, kept in pursuance of the constitution, that the original bill, having passed the house, was sent to the Senate, which passed it with numerous amendments, in all of which the house concurred; but the bill, as approved by the governor, did not contain certain amendments which bore directly upon the issues in the case before the court. The court, in a vigorous opinion delivered by Mr. Justice Campbell, held that the enrolled act, signed by the President of the Senate, and the Speaker of the House of Representatives and the governor is the sole exposition of its contents, and the conclusive evidence of its existence according to its purport, and that it is not allowable to look further to discover the history of the act or ascertain its provisions. After a careful analysis of the adjudged cases the court said: "Every other view *subordinates* the legislature and disregards that coequal position in our system of the three departments of government. If the validity of every act published as law is to be tested by examining its history, as shown by the journals of the two houses of the legislature, there will be an amount of litigation, difficulty and painful uncertainty appalling in its contemplation, and multiplying a hundredfold the alleged uncertainty of the law. Every suit before every court, where the validity of a statute may be called in question as affecting the right of a litigant, will be in the nature of an appeal or writ of error or bill of review for errors apparent on the face of the legislative records, and the journals must be explored to determine if some contradiction does not exist between the journals and the bill signed by the presiding officers of the two houses. What is the law to be declared by the court? It must inform itself as best it can what is the law. If it may go beyond the enrolled and signed bill and try its validity by

the record contained in the journals, it must perform this task as often as called on, and every court must do it. A justice of the peace must do it, for he has as much right, and is as much bound to preserve the constitution and declare and apply the law as any other court, and we will have the spectacle of examination of journals by justices of the peace, and statutes declared to be not law as the result of their journalistic history, and the Circuit and Chancery Courts will be constantly engaged in like manner, and this court, on appeal, have often to try the correctness of the determination of the court below, as to the conclusion to be drawn from the legislative journals on the inquiry as to the validity of the statutes thus tested. . . . Let the courts accept as statutes, duly enacted, such bills as are delivered by the legislature as their acts authenticated as such in the prescribed mode."

In *Weeks* v. *Smith*, 81 Maine, 538, 547 it was said: "Legislative journals are made amid the confusion of a despatch of business, and, therefore, much more likely to contain errors than the certificates of the presiding officers are to be untrue. Moreover public policy requires that the enrolled statutes of our State, fair upon their faces, should not be put in question after the public have given faith to their validity. No man should be required to hunt through the journals of a legislature to determine whether a statute, properly certified by the speaker of the house and the president of the senate and approved by the governor, is a statute or not. The enrolled act, if a public law, and the original, if a private act, have always been held in England to be records of the highest order, and, if they carry no 'death wounds' in themselves, to be absolute verity, and of themselves conclusive."

To the same general effect are *Brodnax* v. *Commissioners*, 64 Nor. Car. 244, 248; *State of Nevada* v. *Swift*, 10 Nevada, 176; *Evans* v. *Browne*, 30 Indiana, 514; *Edgar* v. *Randolph County Com'rs*, 70 Indiana, 331, 338; *Pacific Railroad* v. *The Governor*, 23 Missouri, 353, 362 *et seq.*; *Louisiana Lottery Co.* v. *Richoux*, 23 La. Ann. 743. There are cases in other state courts which proceed upon opposite grounds from those we have indicated as proper. But it will be found, upon

examination, that many of them rested upon constitutional or statutory provisions of a peculiar character, which, expressly, or by necessary implication, required or authorized the court to go behind the enrolled act when the question was, whether the act, as authenticated and deposited in the proper office, was duly passed by the legislature. This is particularly the case in reference to the decisions in Illinois. *Spangler* v. *Jacoby*, 14 Illinois, 297; *Turley* v. *County of Logan*, 17 Illinois, 151; *Prescott* v. *Canal Trustees*, 19 Illinois, 324; *Supervisors* v. *People*, 25 Illinois, 181; *Ryan* v. *Lynch*, 68 Illinois, 160; *People* v. *Barnes*, 35 Illinois, 121. In the last-named case it was said: "Were it not for the somewhat peculiar provision of our Constitution, which requires that all bills before they can become laws shall be read three several times in each house, and shall be passed by a vote of a majority of all the members-elect, a bill thus signed and approved would be conclusive of its validity and binding force as a law. . . . According to the theory of our legislation, when a bill has become a law, there must be record evidence of every material requirement, from its introduction until it becomes a law. And this evidence is found upon the journals of the two houses." But the court added: "We are not, however, prepared to say that a different rule might not have subserved the public interest equally well, leaving the legislature and the executive to guard the public interest in this regard, or to become responsible for its neglect."

The case of *Gardner* v. *The Collector*, 6 Wall. 499, 511, was relied on in argument as supporting the contention of the appellants.

The question there was as to the time when an act of Congress took effect; the doubt, upon that point, arising from the fact that the month and day, but not the year, of the approval of the act by the President appeared upon the enrolled act in the custody of the Department of State. This omission, it was held, could be supplied in support of the act from the legislative journals. It was said by the court: "We are of opinion, therefore, on principle as well as authority, that whenever a question arises in a court of law of the existence of a statute,

or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question; always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule." There was no question in that case as to the existence or terms of a statute, and the point in judgment was that the time when an admitted statute took effect, not appearing from the enrolled act, could be shown by the legislative journals. It is scarcely necessary to say that that case does not meet the question here presented.

Nor do the cases of *South Ottawa* v. *Perkins*, 94 U. S. 260; *Walnut* v. *Wade*, 103 U. S. 683; and *Post* v. *Supervisors*, 105 U. S. 667, proceed upon any ground inconsistent with the views we have expressed. In each of those cases it was held that the question whether a seeming act of the legislature became a law in accordance with the Constitution, was a judicial one, to be decided by the courts and judges, and not a question of fact to be tried by a jury; and without considering the question on principle, this court held, in deference to the decisions of the Supreme Court of Illinois, interpreting the constitution of that State, that it was competent for the court, in determining the validity of an enrolled act, to consult the legislative journals.

Some reliance was also placed by appellants upon section 895 of the Revised Statutes, providing that "extracts from the journals of the Senate, or of the House of Representatives, and of the Executive Journal of the Senate when the injunction of secrecy is removed, certified by the secretary of the Senate or by the clerk of the House of Representatives, shall be admitted as evidence in the courts of the United States, and shall have the same force and effect as the originals would have if produced and authenticated in court." But referring now only to matters which the Constitution does not require to be entered on the journals, it is clear that this is not a statutory declaration that the journals are the highest evidence of the

facts stated in them, or complete evidence of all that occurs in the progress of business in the respective houses; much less that the authentication of an enrolled bill, by the official signatures of the presiding officers of the two houses and of the President, as an act which has passed Congress, and been approved by the President, may be overcome by what the journal of either house shows or fails to show.

We are of opinion, for the reasons stated, that it is not competent for the appellants to show, from the journals of either house, from the reports of committees or from other documents printed by authority of Congress, that the enrolled bill designated H. R. 9416, as finally passed, contained a section that does not appear in the enrolled act in the custody of the State Department.

Second. The third section of the act of October 1st, 1890, c. 1244, § 3, is in these words:

"SEC. 3. That with a view to secure reciprocal trade with countries producing the following articles, and for this purpose, on and after the first day of January, eighteen hundred and ninety-two, whenever, and so often as the President shall be satisfied that the government of any country producing and exporting sugars, molasses, coffee, tea and hides, raw and uncured, or any of such articles, imposes duties or other exactions upon the agricultural or other products of the United States, which in view of the free introduction of such sugar, molasses, coffee, tea and hides into the United States he may deem to be reciprocally unequal and unreasonable, he shall have the power and it shall be his duty to suspend, by proclamation to that effect, the provisions of this act relating to the free introduction of such sugar, molasses, coffee, tea and hides, the production of such country, for such time as he shall deem just, and in such case and during such suspension duties shall be levied, collected and paid upon sugar, molasses, coffee, tea and hides, the product of or exported from such designated country as follows, namely:

"All sugars not above number thirteen Dutch standard in color shall pay duty on their polariscopic tests as follows, namely:

"All sugars not above number thirteen Dutch standard in color, all tank bottoms, sirups of cane juice or of beet juice, melada, concentrated melada, concrete and concentrated molasses, testing by the polariscope not above seventy-five degrees, seven-tenths of one cent per pound; and for every additional degree or fraction of a degree shown by the polariscopic test, two-hundredths of one cent per pound additional.

"All sugars above number thirteen Dutch standard in color shall be classified by the Dutch standard of color, and pay duty as follows, namely: All sugar above number thirteen and not above number sixteen Dutch standard of color, one and three-eighths cents per pound.

"All sugar above number sixteen and not above number twenty Dutch standard of color, one and five-eighths cents per pound.

"All sugars above number twenty Dutch standard of color, two cents per pound.

"Molasses testing above fifty-six degrees, four cents per gallon.

"Sugar drainings and sugar sweepings shall be subject to duty either as molasses or sugar, as the case may be, according to polariscopic test.

"On coffee, three cents per pound.

"On tea, ten cents per pound.

"Hides, raw or uncured, whether dry, salted or pickled, Angora goatskins, raw, without the wool, unmanufactured, asses' skins, raw or unmanufactured, and skins, except sheepskins, with the wool on, one and one-half cents per pound." 26 Stat. 567, 612.

The plaintiffs in error contend that this section, so far as it authorizes the President to suspend the provisions of the act relating to the free introduction of sugar, molasses, coffee, tea, and hides, is unconstitutional, as delegating to him both legislative and treaty-making powers, and, being an essential part of the system established by Congress, the entire act must be declared null and void. On behalf of the United States it is insisted that legislation of this character is sustained by an early decision of this court and by the practice of the govern-

ment for nearly a century, and that, even if the third section were unconstitutional, the remaining parts of the act would stand.

The decision referred to is *The Brig Aurora*, 7 Cranch, 382, 388. What was that case? The non-intercourse act of March 1, 1809, c. 24, secs. 4, 11, forbidding the importation, after May 20, 1809, of goods, wares or merchandise from any port or place in Great Britain or France, provided that "the President of the United States be, and he hereby is, authorized, in case either France or Great Britain shall so revoke or modify her edicts as that they shall cease to violate the neutral commerce of the United States, to declare the same by proclamation;" after which the trade suspended by that act and the act laying an embargo could "be renewed with the nation so doing." 2 Stat. 528. The act of 1809 expired on the 1st of May, 1810, on which day Congress passed another act, c. 39, § 4, declaring that in case either Great Britain or France, before a named day, *so* revoked or modified her edicts "as that they shall cease to violate the neutral commerce of the United States, which fact the President of the United States shall declare by proclamation, and if the other nation shall not" within a given time revoke or modify her edicts in like manner, then certain sections of the act of 1809 "shall from and after the expiration of three months from the date of the proclamation aforesaid, be revived and have full force and effect, so far as relates to the dominions, colonies and dependencies, and to the articles the growth, produce or manufacture of the dominions, colonies and dependencies of the nation thus refusing or neglecting to revoke or modify her edicts in the manner aforesaid. And the restrictions imposed by this act shall, from the date of such proclamation, cease and be discontinued in relation to the nation revoking or modifying her decrees in the manner aforesaid." 2 Stat. 605, 606. On the 2d of November, 1810, President Madison issued his proclamation declaring that France had so revoked or modified her edicts as that they ceased to violate the neutral commerce of the United States. In the argument of that case it was contended by Mr. Joseph R. Ingersoll that Con-

gress could not transfer legislative power to the President, and that to make the revival of a law depend upon the President's proclamation was to give that proclamation the force of a law. To this it was replied that the legislature did not transfer any power of legislation to the President; that they only prescribed the evidence which should be admitted of a fact, upon which the law should go into effect. Mr. Justice Johnson, speaking for the whole court, said: "We can see no sufficient reason why the legislature should not exercise its discretion in reviving the act of March 1, 1809, either expressly or conditionally, as their judgment should direct. The 19th section of that act, declaring that it should continue in force to a certain time, and no longer, could not restrict their power of extending its operation without limitation upon the occurrence of any subsequent combination of events." This certainly is a decision that it was competent for Congress to make the revival of an act depend upon the proclamation of the President, showing the ascertainment by him of the fact that the edicts of certain nations had been *so* revoked or modified that they did not violate the neutral commerce of the United States. The same principle would apply in the case of the suspension of an act upon a contingency to be ascertained by the President, and made known by his proclamation.

To what extent do precedents in legislation sustain the validity of the section under consideration, so far as it makes the suspension of certain provisions and the going into operation of other provisions of an act of Congress depend upon the action of the President based upon the occurrence of subsequent events, or the ascertainment by him of certain facts, to be made known by his proclamation? If we find that Congress has frequently, from the organization of the government to the present time, conferred upon the President powers, with reference to trade and commerce, like those conferred by the third section of the act of October 1, 1890, that fact is entitled to great weight in determining the question before us.

During the administration of Washington, Congress, by an act approved June 4, 1794, c. 41, authorized the President, when Congress was not in session, and for a prescribed period,

"whenever, in his opinion, the public safety shall so require, to lay an embargo on all ships and vessels in the ports of the United States, or upon the ships and vessels of the United States, or the ships and vessels of any foreign nation, under such regulations as the circumstances may require, and to continue or revoke the same, whenever he shall think proper." 1 Stat. 372.

Congress passed, and President Adams approved, the act of June 13, 1798, c. 53, § 5, suspending commercial intercourse between the United States and France and its dependencies, and providing that if the government of France, and all persons acting by or under its authority, before the then next session of Congress, "shall clearly disavow, and shall be found to refrain from the aggressions, depredations and hostilities which have been and are by them encouraged and maintained against the vessels and other property of the citizens of the United States, and against their national rights and sovereignty, in violation of the faith of treaties and the laws of nations, and shall thereby acknowledge the just claims of the United States to be considered as in all respects neutral, and unconnected in the present European war, if the same shall be continued, then and thereupon it shall be lawful for the President of the United States, being well ascertained of the premises, to remit and discontinue the prohibitions and restraints hereby enacted and declared; and he shall be and is hereby authorized to make proclamation thereof accordingly." 1 Stat. 565, 566. A subsequent act, approved February 9, 1799, c. 2, § 4, further suspending commercial intercourse with France and its dependencies, contained this section: "That at any time after the passing of this act, it shall be lawful for the President of the United States, if he shall deem it expedient and consistent with the interest of the United States, by his order, to remit and discontinue, for the time being, the restraints and prohibitions aforesaid, either with respect to the French Republic, or to any island, port or place belonging to the said Republic, with which a commercial intercourse may safely be renewed; and also to revoke such order, whenever, in his opinion, the interest of the United States shall require;

and he shall be, and hereby is, authorized to make proclamation thereof accordingly." 1 Stat. 613, 615. Under the latter act the President issued, June 26, 1799, and May 21, 1800, proclamations declaring it lawful for vessels departing from the United States to enter certain ports of San Domingo. Works of John Adams, vol. 9, pp. 176, 177.

By an act of Congress, approved April 18, 1806, c. 29, it was made unlawful to import, after November 15, 1806, into the United States from any port or place in Great Britain or Ireland, or in any of the colonies or dependencies of Great Britain, articles of which leather, silk, hemp, flax, tin or brass was the material of chief value, woollen cloths whose invoice prices exceeded five shillings sterling per square yard, woollen hosiery, manufactures of glass, silver and plated wares, hats, nails, spikes, ready-made clothing, millinery, beer, ale, porter, pictures and prints. 2 Stat. 379. The operation of this act was suspended by the subsequent act of December 19, 1806, c. 1, § 3, until July 1, 1807. But the last act contained this section: "That the President of the United States be and he is hereby authorized further to suspend the operation of the aforesaid act, if in his judgment the public interest should require it: *Provided*, that such suspension shall not extend beyond the second Monday in December next." 2 Stat. 411. Both of these acts received the approval of President Jefferson.

An act of March 3, 1815, c. 77, approved by President Madison, provided that so much of the several acts imposing duties on the tonnage of ships and vessels, and on goods, wares and merchandise imported into the United States, as imposed a discriminating duty on tonnage between foreign vessels and vessels of the United States, and between goods imported into the United States in foreign vessels and vessels of the United States, be repealed, so far as the same respected the produce or manufacture of the nation to which such foreign ships or vessels belonged; such repeal to take effect in favor of any foreign nation, "whenever the President of the United States shall be satisfied that the discriminating or countervailing duties of such foreign nation, so far as they operate to the disadvantage of the United States," had been abolished.

3 Stat. 224. Satisfactory proof having been received by President Monroe from the Free City of Bremen that from and after the 12th of May, 1815, all discriminating or countervailing duties of the said city, "so far as they operated to the disadvantage of the United States," had been abolished, he issued, July 24, 1818, his proclamation stating that the acts of Congress, upon that subject, were repealed, so far as the same related to the produce and manufacture of that city. Similar proclamations were issued by him in respect to the produce and manufactures of Hamburg, Lubec, Norway and the Dukedom of Oldenburg. 3 Stat. App. I, pp. 792, 793, 794, 795.

By an act approved March 3, 1817, c. 39, prohibiting the importation into the United States, in any foreign vessel, from and after July 4 of that year, of plaster of Paris, the production of any country, or its dependencies from which the vessels of the United States were not permitted to bring the same article, it was provided that the act should continue in force five years from January 31, 1817, provided "that if any foreign nation, or its dependencies, which have now in force regulations on the subject of the trade in plaster of Paris, prohibiting the exportation thereof to certain ports of the United States, shall discontinue such regulations, the President of the United States is hereby authorized to declare that fact by his proclamation, and the restrictions imposed by this act shall, from the date of such proclamation, cease and be discontinued in relation to the nation or its dependencies, discontinuing such regulations." 3 Stat. 361. Proclamations in execution of this act were issued by President Monroe, relating to our trade with Nova Scotia and New Brunswick. 3 Stat. App. pp. 791, 792.

By an act concerning discriminating duties of tonnage and impost, approved January 7, 1824, c. 4, § 4, it was provided that "upon satisfactory evidence being given to the President of the United States, by the government of any foreign nation, that no discriminating duties of tonnage or impost are imposed or levied within the ports of the said nation, upon vessels wholly belonging to citizens of the United States, or upon merchandise, the produce or manufacture thereof, imported in

the same, the President is hereby authorized to issue his proclamation, declaring that the foreign discriminating duties of tonnage and impost within the United States are, and shall be, suspended and discontinued, so far as respects the vessels of the said nation, and the merchandise of its produce or manufacture, imported into the United States in the same; the said suspension to take effect from the time of such notification being given to the President of the United States, and to continue so long as the reciprocal exemption of vessels belonging to citizens of the United States, and merchandise as aforesaid, thereon laden shall be continued, and no longer." 4 Stat. 3. A similar section was embodied in the act of May 24, 1828, c. 111, relating to the same subject, which is substantially preserved in section 4228 of the Revised Statutes. 4 Stat. 308. In execution of these acts, proclamations were issued by the Presidents of the United States as follows: Adams, July 1, 1828, 4 Stat. App. 815; Jackson, May 11, 1829, June 3, 1829, September 18, 1830, April 28, 1835, and September 1, 1836, 4 Stat. App. 814, 815, 816, 11 Stat. App. 781, 782; Polk, November 4, 1847, 9 Stat. App. 1001; Fillmore, November 1, 1850, 9 Stat. App. 1004; Buchanan, February 25, 1858, 11 Stat. App. 795; Lincoln, December 16, 1863, 13 Stat. App. 739; Johnson, December 28, 1866, and January 29, 1867, 14 Stat. App. 818, 819; Grant, June 12, 1869, November 20, 1869, February 25, 1871, December 19, 1871, September 4, 1872, and October 30, 1872, 16 Stat. App. 1127, 1130 to 1137, 17 Stat. App. 954, 956, 957; and Hayes, November 30, 1880, 21 Stat. 800.

A subsequent statute of May 31, 1830, c. 219, repealed all acts and parts of acts which imposed duties upon the tonnage of ships and vessels of foreign nations, provided the President of the United States should be satisfied that the discriminating or countervailing duties of such foreign nations, "so far as they operate to the disadvantage of the United States," had been abolished. 4 Stat. 425. This provision is preserved in section 4219 of the Revised Statutes.

Pursuant to the act of Congress of August 5, 1854, c. 269, § 2, carrying into effect the treaty between the United States and

Great Britain of June 5, 1854, President Pierce issued his proclamation, December 12, 1855, declaring that grain, flour, breadstuffs of all kinds, and numerous other specified articles, should be admitted free of duty from Newfoundland, he having received satisfactory evidence that that province had consented, "in a due and proper manner," to have the provisions of the above treaty extended to it, and to allow the United States the full benefits of all its stipulations, so far as they were applicable to Newfoundland. 10 Stat. 587; 11 Stat. 790.

By an act of Congress, approved March 6, 1866, c. 12, the importation of neat cattle and the hides of neat cattle from any foreign country into the United States was prohibited, the operation of the act, however, to be suspended as to any foreign country or countries, or any parts of such country or countries, whenever the Secretary of the Treasury should officially determine, and give public notice thereof, that such importation would not tend to the introduction or spread of contagious or infectious diseases among the cattle of the United States. The same act provided that "the President of the United States, whenever in his judgment the importation of neat cattle and the hides of neat cattle may be made without danger of the introduction or spread of contagious or infectious disease among the cattle of the United States, may, by proclamation, declare the provisions of this act to be inoperative, and the same shall be afterwards inoperative and of no effect from and after thirty days from the date of said proclamation." 14 Stat. 3. These provisions constituted sections 2493 and 2494 of the Revised Statutes until the passage of the act of March 3, 1883, 22 Stat. 489, c. 121, § 6. And, by the tariff act of 1890, the importation of neat cattle and the hides of neat cattle from foreign countries was prohibited; but authority is given to the Secretary of the Treasury to suspend the operation of the act as to any country, whenever *he* determines that such importation will not lead to the introduction or spread of contagious or infectious diseases among the cattle of the United States. 26 Stat. 616, c. 1244, § 20.

In execution of section 4228 of the Revised Statutes, Presi-

dent Arthur issued a proclamation declaring that on and after the first day of March, 1884, so long as the products of, and articles proceeding from the United States, imported into the Islands of Cuba and Porto Rico, should be exempt from discriminating customs duties, any such duties on the products of, and articles proceeding from Cuba and Porto Rico under the Spanish flag, should be suspended, and discontinued. 23 Stat. 835. President Cleveland, by proclamation of October 13, 1886, revoked this suspension upon the ground that higher and discriminating duties continued to be imposed and levied in the ports named upon certain produce, manufactures or merchandise imported into them from the United States and from foreign countries, in vessels of the United States, than were imposed and levied on the like produce, manufactures or merchandise carried to those ports in Spanish vessels. 24 Stat. 1028.

By the 14th section of the act of June 26, 1884, c. 121, removing certain burdens on the American merchant marine, and encouraging the American foreign carrying trade, certain tonnage duties were imposed upon vessels entering the United States from any foreign port or place in North America, Central America, the West India Islands, Bahama Islands, Bermuda Islands, Sandwich Islands or Newfoundland; and the President was authorized to suspend the collection of so much of those duties, on vessels entering from certain ports, as might be in excess of the tonnage and lighthouse dues, or other equivalent tax or taxes, imposed on American vessels by the government of the foreign country in which such port was situated, and should upon the passage of the act, "and from time to time thereafter as often as it may become necessary by reason of changes in the laws of the foreign countries above mentioned, indicate by proclamation the ports to which such suspension shall apply, and the rate or rates of tonnage duty if any to be collected under such suspension." 23 Stat. 57. In execution of that act Presidents Arthur and Cleveland issued proclamations suspending the collection of duties on goods arriving from certain designated ports. 23 Stat. 841, 842, 844.

It would seem to be unnecessary to make further reference to acts of Congress to show that the authority conferred upon the President by the third section of the act of October 1, 1890, is not an entirely new feature in the legislation of Congress, but has the sanction of many precedents in legislation.[1] While some of these precedents are stronger than

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[1] For instance, as to another subject: By the treaty of May 7, 1830. 8 Stat. 408, it was provided that "if litigations and disputes should arise between subjects of the Sublime Porte and citizens of the United States, the parties shall not be heard, nor shall judgment be pronounced, unless the American Dragoman be present . . . and even when they may have committed some offence, they shall not be arrested and put in prison by the local authorities, but they shall be tried by their minister or consul, and punished according to their offence, following in this respect, the usage observed towards other Franks."

On the 22d June, 1860, an act was passed to carry into effect this and other treaties of a like character, "giving certain judicial powers to consuls or other functionaries of the United States in those countries, and for other purposes." 12 Stat. 72, c. 179. Under this act the consuls of the United States in Egypt exercised judicial powers over citizens of the United States. *Dainese* v. *Hale*, 91 U. S. 13.

On the 23d of March, 1874, an act was passed which provided, 18 Stat. 23, c. 62, "that whenever the President of the United States shall receive satisfactory information that the Ottoman government or that of Egypt, has organized other tribunals, on a basis likely to secure to citizens of the United States, in their dominions, the same impartial justice which they now enjoy there under the judicial functions exercised by the minister, consuls and other functionaries of the United States, pursuant to the act of Congress approved the twenty-second of June, eighteen hundred and sixty . . . he is hereby authorized to suspend the operations of said acts as to the dominions in which such tribunals may be organized, so far as the jurisdiction of said tribunals may embrace matters now cognizable by the minister, consuls or other functionaries of the United States in said dominions, and to notify the government of the Sublime Porte, or that of Egypt, or either of them, that the United States, during such suspension will as aforesaid accept for their citizens the jurisdiction of the tribunals aforesaid, over citizens of the United States, which has heretofore been exercised by the minister, consuls or other functionaries of the United States."

This statute was the response made by the United States to a suggestion coming from the Egyptian government through the Turkish government, that mixed tribunals should be established in Egypt with jurisdiction of "disputes in civil and commercial matters between natives and foreigners, and between foreigners of different nationalities." 2 Foreign Relations, 1873, pp. 1100-1104. The scheme was successful. Codes were adopted;

others, in their application to the case before us, they all show that, in the judgment of the legislative branch of the government, it is often desirable, if not essential for the protection of the interests of our people, against the unfriendly or discriminating regulations established by foreign governments, in the interests of their people, to invest the President with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations. If the decision in the case of *The Brig Aurora* had never been rendered, the practical construction of the Constitution, as given by so many acts of Congress, and embracing almost the entire period of our national existence, should not be overruled, unless upon a conviction that such legislation was clearly incompatible with the supreme law of the land. *Stuart* v. *Laird*, 1 Cranch, 299, 309; *Martin* v. *Hunter*, 1 Wheat. 304, 351; *Cooley* v. *Port Wardens*, 12 How. 299, 315; *Lithographic Co.* v. *Sarony*, 111 U. S. 53, 57; *The Laura*, 114 U. S. 411, 416.

The authority given to the President by the act of June 4, 1794, to lay an embargo on all ships and vessels in the ports of the United States, "whenever, in his opinion, the public safety shall so require," and under regulations, to be continued or revoked "whenever he shall think proper;" by the act of February 9, 1799, to remit and discontinue, for the time being, the restraints and prohibitions which Congress had prescribed with respect to commercial intercourse with the French Republic, "if he shall *deem* it expedient and consistent with the interest of the United States," and "to revoke such order, whenever, in his opinion, the interest of the United States shall require;" by the act of December 19, 1806, to suspend, for a named time, the operation of the non-importation act of the same year, "if in his judgment the public interest should

(Codes Égyptiens, Alexandrie, 1875,) the proclamation of suspension contemplated by the act of March 28, 1874, was issued by President Grant on the 27th of March, 1876, 19 Stat. 662; the quota of foreign judges assigned to the United States was filled by the Khedive upon the nomination of the President; and United States citizens became justiciable by this mixed tribunal. — [REPORTER.]

require it;" by the act of May 1, 1810, to revive a former act, as to Great Britain or France, if either country had not, by a named day, *so* revoked or modified its edicts as not "to violate the neutral commerce of the United States;" by the acts of March 3, 1815, and May 31, 1830, to declare the repeal, as to any foreign nation, of the several acts imposing duties on the tonnage of ships and vessels, and on goods, wares and merchandise imported into the United States, when he should be "satisfied" that the discriminating duties of such foreign nations, "so far as they operate to the disadvantage of the United States," had been abolished; by the act of March 6, 1866, to declare the provisions of the act forbidding the importation into this country of neat cattle and the hides of neat cattle, to be inoperative, "whenever in his judgment" their importation "may be made without danger of the introduction or spread of contagious or infectious disease among the cattle of the United States;" must be regarded as unwarranted by the Constitution, if the contention of the appellants, in respect to the third section of the act of October 1, 1890, be sustained.

That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution. The act of October 1, 1890, in the particular under consideration, is not inconsistent with that principle. It does not, in any real sense, invest the President with the power of legislation. For the purpose of securing reciprocal trade with countries producing and exporting sugar, molasses, coffee, tea and hides, Congress itself determined that the provisions of the act of October 1, 1890, permitting the free introduction of such articles, should be suspended as to any country producing and exporting them, that imposed exactions and duties on the agricultural and other products of the United States, which the President deemed, that is, which he found to be, reciprocally unequal and unreasonable. Congress itself prescribed, in advance, the duties to be levied, collected and paid, on sugar, molasses, coffee, tea or hides, produced by or exported from such designated

country, while the suspension lasted. Nothing involving the expediency or the just operation of such legislation was left to the determination of the President. The words, "he may deem," in the third section, of course, implied that the President would examine the commercial regulations of other countries producing and exporting sugar, molasses, coffee, tea and hides, and form a judgment as to whether they were reciprocally equal and reasonable, or the contrary, in their effect upon American products. But when he ascertained the fact that duties and exactions, reciprocally unequal and unreasonable, were imposed upon the agricultural or other products of the United States by a country producing and exporting sugar, molasses, coffee, tea or hides, it became his duty to issue a proclamation declaring the suspension, as to that country, which Congress had determined should occur. He had no discretion in the premises except in respect to the duration of the suspension so ordered. But that related only to the enforcement of the policy established by Congress. As the suspension was absolutely required when the President ascertained the existence of a particular fact, it cannot be said that in ascertaining that fact and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws. Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was simply in execution of the act of Congress. It was not the making of law. He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect. It was a part of the law itself as it left the hands of Congress that the provisions, full and complete in themselves, permitting the free introduction of sugars, molasses, coffee, tea and hides, from particular countries, should be suspended, in a given contingency, and that in case of such suspensions certain duties should be imposed.

"The true distinction," as Judge Ranney speaking for the Supreme Court of Ohio has well said, "is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or

discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made." *Cincinnati, Wilmington &c. Railroad* v. *Commissioners*, 1 Ohio St. 88. In *Moers* v. *City of Reading*, 21 Penn. St. 188, 202, the language of the court was: "Half the statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But it cannot be said that the exercise of such discretion is the making of the law." So, in *Locke's Appeal*, 72 Penn. St. 491, 498: "To assert that a law is less than a law, because it is made to depend on a future event or act, is to rob the legislature of the power to act wisely for the public welfare whenever a law is passed relating to a state of affairs not yet developed, or to things future and impossible to fully know." The proper distinction the court said was this: "The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and, must, therefore, be a subject of inquiry and determination outside of the halls of legislation."

What has been said is equally applicable to the objection that the third section of the act invests the President with treaty-making power.

The court is of opinion that the third section of the act of October 1, 1890, is not liable to the objection that it transfers legislative and treaty-making power to the President. Even if it were, it would not, by any means, follow that other parts of the act, those which directly imposed duties upon articles imported, would be inoperative. But we need not in this connection enter upon the consideration of that question.

Third. The act of October 1, 1890, c. 1244, sec. 1, par. 231, "Schedule E—Sugar," provides that "on and after July first, eighteen hundred and ninety-one, and until July first,

nineteen hundred and five, there shall be paid, from any moneys in the Treasury not otherwise appropriated, under the provisions of section three thousand six hundred and eighty-nine of the Revised Statutes, to the producer of sugar testing not less than ninety degrees by the polariscope, from beets, sorghum or sugar-cane grown within the United States, or from maple sap produced within the United States, a bounty of two cents per pound; and upon such sugar testing less than ninety degrees by the polariscope, and not less than eighty degrees, a bounty of one and three-fourths cents per pound, under such rules and regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe." 26 Stat. 567, 583.

Appellants contend that Congress has no power to appropriate money from the Treasury for the payment of these bounties, and that the provisions for them have such connection with the system established by the act of 1890 that the entire act must be held inoperative and void. The question of constitutional power thus raised depends principally, if not altogether, upon the scope and effect of that clause of the Constitution giving Congress power "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States." Art. 1, sec. 8. It would be difficult to suggest a question of larger importance, or one the decision of which would be more far-reaching. But the argument that the validity of the entire act depends upon the validity of the bounty clause is so obviously founded in error that we should not be justified in giving the question of constitutional power, here raised, that extended examination which a question of such gravity would, under some circumstances, demand. Even if the position of the appellants with respect to the power of Congress to pay these bounties were sustained, it is clear that the parts of the act in which they are interested, namely, those laying duties upon articles imported, would remain in force. "It is an elementary principle," this court has said, "that the same statute may be in part constitutional and in part unconstitutional, and that if the parts are wholly inde-

pendent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected." *Allen* v. *Louisiana*, 103 U. S. 80, 83. And in *Huntington* v. *Worthen*, 120 U. S. 97, 102, Mr. Justice Field, speaking for the court, said: "It is only when different clauses of an act are so dependent upon each other that it is evident the legislature would not have enacted one of them without the other — as when the two things provided are necessary parts of one system — that the whole act will fall with the invalidity of one clause. When there is no such connection and dependency, the act will stand, though different parts of it are rejected." It cannot be said to be evident that the provisions imposing duties on imported articles are so connected with or dependent upon those giving bounties upon the production of sugars in this country that the former would not have been adopted except in connection with the latter. Undoubtedly, the object of the act was not only to raise revenue for the support of the government, but to so exert the power of laying and collecting taxes and duties as to encourage domestic manufactures and industries of different kinds, upon the success of which, the promoters of the act claimed, materially depended the national prosperity and the national safety. But it cannot be assumed, nor can it be made to appear from the act, that the provisions imposing duties on imported articles would not have been adopted except in connection with the clause giving bounties on the production of sugar in this country. These different parts of the act, in respect to their operation, have no legal connection whatever with each other. They are entirely separable in their nature, and, in law, are wholly independent of each other. One relates to the imposition of duties upon imported articles; the other, to the appropriation of money from the Treasury for bounties on articles produced in this country. While, in a general sense, both may be said to be parts of a system, neither the words nor the general scope of the act justifies the belief that Congress intended they should operate as a whole, and not separately for the purpose of accomplishing the objects for which they were respectively designed. Unless it be impossible to avoid

it, a general revenue statute should never be declared inoperative in all its parts because a particular part relating to a distinct subject may be invalid. A different rule might be disastrous to the financial operations of the government, and produce the utmost confusion in the business of the entire country.

We perceive no error in the judgments below, and each is

Affirmed.

MR. JUSTICE LAMAR, (with whom concurred MR. CHIEF JUSTICE FULLER,) dissenting from the opinion but concurring in the judgments of the court.

THE CHIEF JUSTICE and myself concur in the judgment just announced. But the proposition maintained in the opinion, that the third section, known as the reciprocity provision, is valid and constitutional legislation, does not command our assent, and we desire to state very briefly the ground of our dissent from it. We think that this particular provision is repugnant to the first section of the first article of the Constitution of the United States, which provides that "all legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." That no part of this legislative power can be delegated by Congress to any other department of the government, executive or judicial, is an axiom in constitutional law, and is universally recognized as a principle essential to the integrity and maintenance of the system of government ordained by the Constitution. The legislative power must remain in the organ where it is lodged by that instrument. We think that the section in question does delegate legislative power to the executive department, and also commits to that department matters belonging to the treaty-making power, in violation of paragraph two of the second section of article two of the Constitution. It reads thus:

"§ 3. That with a view to secure reciprocal trade with countries producing the following articles, and for this purpose, on and after the first day of January, eighteen hundred and ninety-

two, whenever, and so often as the President shall be satisfied that the government of any country producing and exporting sugars, molasses, coffee, tea and hides, raw and uncured, or any of such articles, imposes duties or other exactions upon the agricultural or other products of the United States, which in view of the free introduction of such sugar, molasses, coffee, tea and hides into the United States *he may deem to be reciprocally unequal and unreasonable*, he shall have the power and it shall be his duty to suspend, by proclamation to that effect, the provisions of this act relating to the free introduction of such sugar, molasses, coffee, tea and hides, the production of such country, *for such time as he shall deem just*, and in such case and during such suspension duties shall be levied, collected and paid upon sugar, molasses, coffee, tea and hides, the product of or exported from such designated country as follows, namely." 26 Stat. 612.

We do not think that legislation of this character is sustained by any decision of this court, or by precedents in congressional legislation numerous enough to be properly considered as the practice of the government. One of the instances referred to, as legislation analogous to this section, is that embodied in the acts of Congress of 1809 and 1810 known as the "non-intercourse acts," pronounced by this court to be valid in the case of *The Brig Aurora*, 7 Cranch, 383. The act of March 1, 1809, forbidding any importation after May 20, 1809, from Great Britain or France, provided that "the President of the United States be, and he hereby is, authorized, in case either France or Great Britain shall so revoke or modify her edicts, as that they shall cease to violate the neutral commerce of the United States, to declare the same by proclamation," after which the trade suspended by that act and the act laying an embargo could be renewed with the nation so doing. 2 Stat. 528, c. 24, § 11. That act having expired, Congress, on the first of May, 1810, passed an act, (2 Stat. 605, c. 39, § 4,) which enacted "that in case either Great Britain or France shall, before the third day of March next, so revoke or modify her edicts as that they shall cease to violate the neutral commerce of the United States, which fact

the President of the United States shall declare by proclamation, and if the other nation shall not, within three months thereafter, so revoke or modify her edicts in like manner," the restrictions of the embargo act, "shall, from and after the expiration of three months from the date of the proclamation aforesaid, be revived and have full force and effect, so far as relates to . . . the nation thus refusing or neglecting to modify her edicts in the manner aforesaid. And the restrictions imposed by this act shall, from the date of such proclamation, cease and be discontinued in relation to the nation revoking or modifying her decrees in the manner aforesaid."

These enactments, in our opinion, transferred no legislative power to the President. The legislation was purely contingent. It provided for an ascertainment by the President of an event in the future, an event defined in the act and directed to be evidenced by his proclamation. It also prescribed the consequences which were to follow upon that proclamation. Such proclamation was wholly in the nature of an executive act, a prescribed mode of ascertainment, which involved no exercise by the President of what belonged to the law-making power. The supreme will of Congress would have been enforced whether the event provided for had or had not happened, either in the continuance of the restrictions, on the one hand, or on the other, in their suspension.

But the purpose and effect of the section now under consideration are radically different. It does not, as was provided in the statutes of 1809 and 1810, entrust the President with the ascertainment of a fact therein defined upon which the law is to go into operation. It goes farther than that, and deputes to the President the power to suspend another section in the same act whenever "he may deem" the action of any foreign nation producing and exporting the articles named in that section to be "reciprocally unequal and unreasonable;" and it further deputes to him the power to continue that suspension and to impose revenue duties on the articles named "for such time as he may deem just." This certainly extends to the executive the exercise of those discretionary powers which the Constitution has vested in the law-making depart-

ment. It unquestionably vests in the President the power to regulate our commerce with all foreign nations which produce sugar, tea, coffee, molasses, hides or any of such articles; and to impose revenue duties upon them for a length of time limited solely by his discretion, whenever he deems the revenue system or policy of any nation in which those articles are produced reciprocally unequal and unreasonable, in its operation upon the products of this country.

These features of this section are, in our opinion, in palpable violation of the Constitution of the United States, and serve to distinguish it from the legislative precedents which are relied upon to sustain it, as the practice of the government. None of these legislative precedents, save the one above referred to, have, as yet, undergone review by this court or been sustained by its decision. And if there be any congressional legislation which may be construed as delegating to the President the power to suspend any law exempting any importations from duty, or to reimpose revenue duties on them, upon his own judgment as to what constitutes in the revenue policy of other countries a fair and reasonable reciprocity, such legislative precedents cannot avail as authority against a clear and undoubted principle of the Constitution. We say revenue policy, because the phrase "agricultural or other products of the United States" is comprehensive, and embraces our manufacturing and mining as well as agricultural products, all of which interests are thus entrusted to the discretion of the President, in the adjustment of trade relations with other countries, upon a basis of reciprocity.

Whilst, however, we cannot agree to the proposition that this particular section is valid and constitutional, we do not regard it as such an essential part of the Tariff Act as to invalidate all its other provisions; and we therefore concur in the judgment of this court affirming the judgments of the court below in the several cases.

APPENDIX.

In Memoriam.

JOSEPH P. BRADLEY, LL.D.

Mr. Justice Bradley died at his residence in Washington on the morning of Friday, January 22, 1892. On the coming in of the court, on that day, the Chief Justice said: "Since the adjournment yesterday a very heavy loss has befallen the country and the court, and a great sorrow been visited upon us in the death of Mr. Justice Bradley. The court will not proceed with business, but will adjourn until Tuesday next at the usual hour, when motions noticed for Monday will be entertained."

On the following Sunday, brief services were held at the house of the deceased in Washington, and on Monday, the 25th, the remains, accompanied by the family, and by the court and its officers, were taken to Newark, New Jersey, where, after public funeral services in the North Reformed Church, on Broad Street, they were buried.

At noon on Saturday, the 6th day of February, 1892, the bar of the Supreme Court of the United States and the officers of the court met in the court room in the Capitol, to take action in this matter. The meeting was called to order by J. Hubley Ashton, Esq., of the District of Columbia. On his motion, George Gray, Esq., of Delaware, was called to the chair, and James H. McKenney, Esq., Clerk of the court, was requested to act as Secretary.

On motion of George Harding, Esq., of Pennsylvania, the chair appointed George Frisbie Hoar, Esq., of Massachusetts, George Harding, Esq., Cortlandt Parker, Esq., of New Jersey, J. Hubley Ashton, Esq., Thomas J. Semmes, Esq., of Louisiana, Joseph H. Choate, Esq., of New York, John T. Morgan, Esq., of Alabama, and John B. Henderson, Esq., of Missouri, a committee to prepare and report resolutions for consideration and adoption by the meet-

ing. Mr. Harding, on behalf of the committee, reported a series of resolutions which, after remarks by Mr. Parker, Mr. Harding, Mr. A. Q. Keasbey, of New Jersey, Mr. Samuel Dixon, of Pennsylvania, and Mr. J. Dixon, of New Jersey, were unanimously adopted; after which, on motion of Mr. Ashton, the meeting adjourned.

On Monday, the 7th of March, 1892, MR. ATTORNEY GENERAL, in compliance with the request of the bar, presented these resolutions to the court with the following remarks:

MAY IT PLEASE THE COURT: On the 6th day of February last, the bar of this court adopted a memorial which I now have the honor to present:

"*Resolved*, That the members of the bar of the Supreme Court of the United States desire to record their sense of the loss that has come to the profession and to the nation in the death of Joseph P. Bradley, Justice of this court.

"He brought to the bench long experience, great energy, strong and patriotic convictions, a scholarship as wide and varied as it was thorough and exact, and an unyielding courage. He was at the same time one of those rare characters in which vast learning is united with intense activity and business capacity; a master of men as well as books, practical as well as theoretical.

"During his long service here he has more than done every duty, growing constantly in his work and in the regard of his fellows and of the nation, until, in the fullness of age, rounded and softened by years of judicial duty, gentle scholarship and labor for the people, he has passed away lamented by the bar, the bench, and the country that he served; a life complete, with a large place in history among the creators and moulders of our national jurisprudence.

"*Resolved*, That a copy of these resolutions be presented by the president and secretary of this meeting to the family of Mr. Justice Bradley, with the sincere sympathy of the profession in their bereavement, and that the Attorney General be requested to present to the Supreme Court, in session, the proceedings of this meeting."

These occasions are recurring with painful frequency. In each of the years 1887, 1888, 1889, 1890, and now again at the threshold of 1892, an honored member of this court has been summoned into

that presence of inconceivable solemnity, where all must appear at last to answer for duty done or duty neglected. Well may the bar and the court say they are "becoming reluctant to grant these, their last highest honors." Yet neither in length of days, nor in their results, is the end of the life of Justice Bradley untimely. Having passed the limit prescribed by the Psalmist, and "by reason of strength" attained almost fourscore years, all the journey rich and useful in the fruits of his talents, his industry, and his learning, "like the mildness, the serenity, the continuing benignity of the summer's day he has gone down with slow, descending, grateful, long-lingering light," the radiance of the evening giving sure promise of a morning and a morrow of endless brightness.

The oldest of eleven children, of Puritan New England lineage, Joseph P. Bradley was born on a farm in Albany County, New York, on the 14th day of March, 1813, and, therefore, on January 22d last, the day of his death, was near the end of his seventy-ninth year.

The means of his parents, who at his birth were only nineteen years old, were slender, and the circumstances of his childhood and youth were very hard. The little farm was rugged, almost mountainous, the soil thin and barren. The meagre crops were eked out by cutting wood from the hillsides and burning it into charcoal, which young Bradley peddled about the streets of Albany. But though sore pressed to supply the needs of their fast-growing flock, this father and mother were of the intelligent farmer class, so often ambitious to give their children a better chance than their own, and they did for their boy the best they could. A few months' country school in winter, and a few books, were the foundation on which a great superstructure of learning was built, a foundation which, with all due respect to so-called improved school systems and modern methods, it is believed was all the better for the ambitious boy, because the opportunities were rare and the few books so entirely mastered. In the intervals of necessary work we can imagine this boy, in garments homespun and homemade, every thread and every stitch inwoven with the warmth of a mother's love, slight of form but full of life and energy, quick of motion and quick of temper, eager and apt in all the sports with his fellows, but even more eager and more apt in the use of his slight opportunities, by book or school, to feed the beginnings of that

hunger of the mind which was the spur of his whole life and which to the last was insatiable.

At sixteen this boy, with so few advantages, instead of a pupil became the teacher of a winter school, an occupation continued for four seasons. This was the best possible training, because it necessitated thoroughness. As a pupil one may get along with superficial knowledge. Before one can instruct, he must not merely know, but he must know how and why and for what purpose; he must know not merely facts, but principles. At twenty, entering the freshman class at Rutgers, with a very meagre preparation in Greek and Latin, at the end of the year he had, nevertheless, made such progress as to jump the sophomore and enter the junior class, and was graduated two years later with the late Secretary Frelinghuysen, Governor Newell and Cortlandt Parker, all eminent in the law and in public affairs.

Mr. Parker says that Bradley was *facile princeps* in his class, though compelled to miss the last term of his course, in order, by teaching, to earn money to pay his way.

Of many incidents of his student life, suggestive of his future character and achievements, time forbids to speak. They all prophesied a man of integrity, of industry, and of notable talents.

Young Bradley does not seem to have been strikingly precocious — was not a genius like Grotius or Hamilton, striding at once to the front of his profession. His first years at the bar, as with most young men, were a struggle; his success and greatness were a growth, the result of days of toil and nights of study. The unfolding of the law to him is admirably described in his own language:

"As in the creation we may suppose that the light of the stars did not all burst upon man at a single moment, but came upon him from their distant chambers in successive beams one after another, according to their recondite stations in space, so in the study of the law one great principle after another comes to the yearning mind and overspreads it with light and gladness; and many long years may elapse before one can feel that he has really mastered the law and fully obtained the 'gladsome light of jurisprudence' spoken of by Lord Coke."

As a student and as a man a most striking trait of his character was thoroughness. He studied almost everything, and whatever he studied became his own, a part of his very self.

Proceedings on the death of Mr. Justice Bradley.

In concluding the address (already quoted from) delivered by him before the students of the law school of the University of Pennsylvania in 1884, an address worthy the pen of Blackstone, Justice Bradley pictured the ideal lawyer as follows: "To sum up all in one word, in order to be an accomplished lawyer it is necessary, besides having a knowledge of the law, to be an accomplished man, graced with at least a general knowledge of history, of science, of philosophy, of the useful arts, of the modes of business, of everything, in fact, that concerns the well-being and intercourse of men in society. He ought to be a man of large understanding; he must be a man of large acquirements and rich in general information, for he is a priest of the law, which is the bond and support of civil society, and which extends to and regulates every relation of one man to another in that society, and every transaction that takes place in it. Trained in such a profession and having these acquirements and two things more, which can never be omitted from the category of qualifications — incorruptible integrity and a high sense of honor — the true lawyer cannot but be the highest style of a man, fit for any position of trust, public or private; one to whom the community can look up as a leader and guide; fit to judge and to rule in the highest places of magistracy and government, an honor to himself, an honor to his kind."

Studying his life and its results, one is impressed that this picture was ever before him. By a long life of striving, probably more nearly than any one of his time, he attained to that lofty ideal.

Of Sir Thomas More, the first layman commoner to become lord chancellor, and who was wiser than his contemporaries by at least three hundred years, it is said that "he was perfecting himself in most of the liberal sciences, as music, arithmetic, geometry, astronomy, and growing to be a perfect historian." So of Judge Bradley. While the law was his business and the great study of his life, many, perhaps I should say most, other fields of knowledge were diligently cultivated, not only as recreations, but as auxiliary to his profession; mathematics, for which he had a special fondness and aptitude, and which he pursued with delight into its most abstruse applications, astronomy, theology, biblical criticism, languages, literature, science, political economy, in short, he seemed to have studied almost everything, and to have made a part of himself all that his thought had touched. Yet wide and profound as

were the general researches of this great man, they were only subsidiary to his work in the law. For thirty years he studied and practised his profession in all its branches with great diligence and great success.

William Pinkney is said to have declared that, in his time, only two men at the bar of the United States had mastered Coke upon Littleton — Chief-Justice Parsons and himself. Indeed, to acquire a thorough knowledge of English and American jurisprudence, as administered in the courts of law, chancery, and admiralty, is a life task, to be accomplished only by large abilities under the spur of high ambition. Add to this a thorough acquaintance with the jurisprudence of republican and imperial Rome, with the Code Napoléon, and generally with the laws of continental Europe, and we approximate the strictly professional resources of this great lawyer and judge. Indeed, to speak the truth of this man's marvellous learning is to invite the charge of exaggerated eulogy. Yet neither in his writings nor in personal intercourse was there any display by Justice Bradley of his acquirements. One was impressed, not with what he knew, but with what he was and what he did. All that he learned enlarged the man; it did not merely add to the load of his possessions.

He was a modest man.

> "Knowledge is proud that he has learned so much;
> Wisdom is humble that he knows no more."

Nor was Justice Bradley simply a student, a man of learning. He was a practical business man, a man of affairs — a man to be called upon where large business interests were to be handled — a patriot, not only wise in council, but capable, energetic, and efficient in action when the government was in peril, when troops were to be raised, transportation furnished, and men, munitions and supplies hurried to the front.

Prior to his appointment to this bench Mr. Bradley never held a public office; yet no man was more active and influential, by word and deed, on the side of whatsoever things were just and of good report in his city and State.

His study of the law was not as something abstract, speculative, lifeless, but in its relations to society — yea, as the very essence, the lifeblood of civil society, even as the surgeon studies the life of his living subject. He had not the gift of eloquence, as the

term is generally understood in its relation to juries; but he had what is vastly more important to a lawyer and a judge, the power of clear, terse, vigorous statement, which, illuminating the subject under discussion, if it does not enlist the feelings, does convince the understanding.

Politically his affinity was rather in the school of Hamilton than of Jefferson. He believed that, in framing the Federal Constitution, the fathers intended to create a nation, a sovereign among the sovereigns of the earth; and, his judgment approving their work, he omitted no opportunity to assert and vindicate that sovereignty. Hence in his decisions upon constitutional questions, whether arising out of economic or quasi political issues, the national idea always appears, even as the strand royal in the woof of all the banners of Britain.

Of the quality and measure of his work as a justice of this court, running through near sixty volumes of the reports, there is no need to speak. With all his learning, with all his familiarity with reported decisions, Justice Bradley's opinions rarely rest primarily on adjudged cases. They are bottomed in principle, and then, when practicable, buttressed by authority. The principle involved is clearly stated, with its necessary logical results, and cases are cited to show that, on similar facts, like deductions have approved themselves to other judges — been sanctioned by other courts. The conclusion is right, not because others have said so, but others with him have said so, because it is right. Being what he was, the work of Justice Bradley could not be less than what it is — worthy of the man, an honor to the great court and the great country for which he spoke. His opinions are their own eulogy, the best, the most enduring monument to the fame of their author.

But let no jurist suppose that popular fame awaits him. Such honors are for more showy service, for men on horseback, or for those in political life who touch the people's heart — excite national enthusiasm. The laws of society like the laws of nature work unseen and in silence. The principle of gravitation, pervading and regulating the material universe, was unnoted by men for near six thousand years. If the law herself, omnipresent and all-beneficent, excites so little interest, her priests, quietly ministering in her temple, must be content with respect and veneration. They may not hope for popular applause.

Proceedings on the death of Mr. Justice Bradley.

Justice Bradley was a Christian man, cherished the domestic virtues in his home, was a good neighbor, and a good citizen. He tried always to preserve a conscience void of offence toward God and man. Charges against his integrity or honor fell away from him as hurtless as hail from the face of yonder monument. To assert that such endowments, enriched by such cultivation, have perished, that the light of such a life has sunk in endless night, is to impeach the economy of nature.

Justice Bradley was a great lawyer, a great magistrate, a great man. He exalted the tribunal wherein he sat; he enlarged the measure of the place he occupied. His successor will in due time be appointed; his place will not soon be filled.

Mr. Chief Justice Fuller responded as follows:

We receive the memorial of the bar and the address of the Attorney General as deserved tributes to the eminent man, whose labors have illuminated the conclusions of this tribunal, and whose gracious presence has been to its members a source of inspiration and fraternal regard for so many years. We, indeed, sorrow deeply that we shall see his face no more.

The story of the lives of those who have triumphed over adverse circumstance and by indomitable will and industry attained that greatness in usefulness and in fame to which their mental gifts entitled them, is always full of interest and instruction, and in portraying the early difficulties surmounted by our departed brother, the Attorney General has justly called attention to the impressive lesson taught, in that particular, by his career, and indicated one of the most striking grounds of the success with which that career was attended. For the capacity for unremitting intellectual toil was his, accompanied by that power of concentration wherein lies the secret of mastery.

He had not only the "inquiring" but the "intending" mind. He not only looked into things, but threw himself upon them and possessed himself of them. In each instance, his nature seemed subdued to what it worked in, "like the dyer's hand." Minuteness and comprehensiveness went together, so that to his understanding the illustration from the Arabian Nights might well be applied, as it was to Bacon, that it resembled the fairy's tent, which could be placed, perfect in its proportions, on the hand, but

set up upon the plain, whole armies could encamp beneath its shade.

It would be unreasonable to say that he took "all knowledge for his province," yet the range of his studies was vast; the books chewed and digested, many; and his acquaintance with affairs so extensive, that what was original and what acquired poured from him in a common flood.

If, as has been said, great judges may be divided into those who decide the particular dispute correctly, and those who, in doing that, expound the principles which will govern future cases, Mr. Justice Bradley undeniably belonged to the latter class; for his decisions in disposing of the matter in hand so explained the reason and the philosophy of the rule applied, as to furnish a guide to the solution of problems to come.

Taking his seat upon this bench, conversant with every branch of the law, and with a mind filled with the results of brooding over fundamental principles in the vigils of many years, there is no ground for surprise that he has left a lasting impress upon the jurisprudence of his country. His opinions from the 9th Wallace to the 141st United States, (numbering nearly five hundred,) couched in pure, undefiled English, vigorous but elegant, whether in the great domain of constitutional law, in cases at law or in equity, in admiralty, in patent causes, covering the whole field of judicial investigation, whether involving the application of the subtle learning of the common law or the refined and equitable distinctions of the civil, whether treating of the principles of social order, of civil and political liberty, the bases of forms of government or the immortal structure of his own, constitute a repository of statesmanlike views, and of enlightened rules in the administration of justice, resting upon the eternal principles of right and wrong, which will never pass into oblivion — an edifice which will remain even though time erase from its corner-stone the name of the architect and builder. This is the exceeding great reward of an illustrious magistrate, that his work in contributing to the progress and happiness of mankind, by the just enforcement of the laws, will last as long as humanity endures.

The President of the United States, in acknowledging the official notification of Mr. Justice Bradley's death, said: "He was not only learned in the law, but the temper of his mind was so fine and his wisdom so great that I do not wonder that you valued his

counsels so highly." This observation is discriminating and just, for it touches that reserved force, termed character, which gave Mr. Justice Bradley an influence beyond the mere words he wrote or uttered. Fineness of mind, wisdom of thought, cordiality of heart, simplicity of manner, conscientious devotion to duty, an absolute integrity — these he had, and possessing these, he has left no unfinished window in the palace of the reputation bequeathed to posterity. Never suffering the talents given him to be weakened or extirpated by disuse, he persevered in the performance of public duty far beyond the period assigned as entitling to well-earned repose.

And so beneath the quiet stars, that appeared in the heavens as the twilight faded away, he continued to reap the harvest of a well-spent life, and at the summons of his Master came, bringing his sheaves with him.

An adjournment has heretofore been had as a mark of respect to the memory of our beloved associate, and a majority of our number has attended the committal of his body in the sure and certain hope of the life of the world to come. The resolutions and the remarks which have accompanied their presentation will be entered upon the record.

INDEX.

ACCRETION.

See RIPARIAN OWNER.

ALASKA.

See BEHRING SEA;
JURISDICTION, D, 1, 3, 4.

ALIEN IMMIGRANT.

The act of February 26, 1885, "to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States, its Territories, and the District of Columbia," 23 Stat. 332, c. 164, does not apply to a contract between an alien, residing out of the United States, and a religious society incorporated under the laws of a State, whereby he engages to remove to the United States and to enter into the service of the society as its rector or minister. *Holy Trinity Church* v. *United States*, 457.

APPEAL.

See BEHRING SEA.

APPURTENANCE.

An appurtenance is that which belongs to or is connected with something else to which it is subordinate or less worthy, and with which it passes as an incident; and in strict legal sense land can never be appurtenant to land. *New Orleans Pacific Railway Co.* v. *Parker*, 42.
See RAILROAD, 1, 3.

AVULSION.

See RIPARIAN OWNER.

BEHRING SEA.

At a time when a diplomatic correspondence was going on between the United States and Great Britain respecting the extent of the jurisdiction of the former in the waters of Behring Sea, a libel in admiralty was filed in the District Court of Alaska, alleging a seizure by the

United States authorities of a vessel "within the limits of Alaska Territory, and in the waters thereof and within the civil and judicial District of Alaska, to wit: within the waters of that portion of Behring Sea belonging to the United States and said district, on waters navigable from the sea by vessels of ten or more tons burden," and charging that "the said vessel and her captain, officers and crew were then and there found engaged in killing fur seals within the limits of Alaska Territory and in the said waters thereof, in violation," etc. The findings of fact followed this description, and described the act complained of as done "within the waters of Alaska." No request was made to have the findings made more specific as to the place where the offence was committed. The vessel being condemned, the claimants appealed to this court. The appeal was duly entered and docketed, and was then dismissed on application of the appellant, who applied for leave to file an application for a writ of prohibition to restrain the court below from enforcing the sentence or the decree of condemnation. Leave being granted, the petition was filed, and it is now *Held*,

(1) That the legal inference from the findings of fact is, that the act took place within the jurisdiction of the United States;

(2) That an appeal lay to this court from the decree of the District Court;

(3) That, the District Court having found the facts, this court would be limited, on appeal, to the consideration of the questions of law presented by the record;

(4) That the District Court on the pleadings and facts found had jurisdiction of the case, and the petitioner might have prosecuted an appeal; and that the appeal taken was insufficient for petitioner's purposes, because of his neglect to have included in the findings the exact locality of the seizure;

(5) That for this reason the writ of prohibition should not issue: the court resting its denial of it on this ground, although it might have placed it upon the well settled principle that an application to a court to review the action of the political department of the government, upon a question pending between it and a foreign power, and to determine whether the government was right or wrong, made while diplomatic negotiations are still going on, should be denied. *In re Cooper*, 472.

BILL OF REVIEW.

See EXECUTOR AND ADMINISTRATOR, 1.

BOUNDARY.

See CONSTITUTIONAL LAW, A, 13;
EQUITY, 3;
JURISDICTION, B, 7.

CAPTURED AND ABANDONED PROPERTY.

See REBELLION, 3.

CASES AFFIRMED.

1. As the bill of exceptions does not purport to contain all the evidence, and as no request was made for a finding of fact as to the actual fact of the killing of the seals and the seizure of the vessel, the rulings in *Ex parte Cooper*, 143 U. S. 472, are decisive of this case, and it is followed. *The Sylvia Handy*, 513.
2. The case of *Munn* v. *Illinois*, 94 U. S. 113, reviewed and adhered to, and its application in cases decided in the state courts considered. *Budd* v. *New York*, 517.
3. *Hammond* v. *Hopkins*, 143 U. S. 224, cited and followed. *Hoyt* v. *Latham*, 553.

See DISTRICT OF COLUMBIA, 2;
MAILS, TRANSPORTATION OF;
STATUTE, B, 1.

CASES DISTINGUISHED OR EXPLAINED.

1. *Ex parte Dubuque & Pacific Railroad*, 1 Wall. 69, distinguished from this case. *Smale* v. *Mitchell*, 99.
2. The decision in *Chicago &c. Railway Co.* v. *Minnesota*, 134 U. S. 418 explained. *Budd* v. *New York*, 517.
3. *United States* v. *Langston*, 118 U. S. 389, distinguished from this case. *Dunwoody* v. *United States*, 578.

CHARGE TO THE JURY.

When the trial court has, in its general charge, given the substance of instructions requested, there is no error in refusing to give them in the language requested. *Erie Railroad Co.* v. *Winter*, 60.

CIRCUIT COURTS OF APPEALS.

See JURISDICTION, B, 3.

CITIZEN.

See NATURALIZATION.

COMMON CARRIER.

1. Passengers on railroad trains are not presumed or required to know the rules and regulations of the company, made for the guidance of its conductors and employés, as to its own internal affairs. *Erie Railroad Co.* v. *Winter*, 60.
2. Plaintiff bought a ticket in Boston entitling him to a passage over defendant's road. At the time he informed the ticket agent of his wish

to stop off at the Olean station, and was then told by the agent that he would have to speak to the conductor about that. Between Binghamton and Olean the plaintiff informed the conductor that he wished to stop over at Olean and the conductor, instead of giving him a stop-over ticket, punched his ticket and told him that was sufficient to give him the right to stop over at Olean, and afterwards to use the punched ticket between Olean and Salamanca. He made the stop, and taking another train to Salamanca, presented the punched ticket, informing the conductor of what had taken place. The conductor refused to take it and demanded full fare. The payment of this being refused the conductor stopped the train at the next station and ejected him from it, using such force as was necessary. *Held*, (1) That he was rightfully on the train at the time of his expulsion; (2) That the conductor had no right to put him off for not paying his fare; (3) That the company was liable for the act of the conductor; (4) That the passenger had a right to refuse to be ejected from the train, and to make a sufficient resistance to being put off to denote that he was being removed against his will by compulsion; (5) That the fact that under such circumstances he was put off the train was, of itself, a good cause of action against the company, irrespective of any physical injury he might have then received, or which was caused thereby. *Erie Railroad Co.* v. *Winter*, 60.

See EVIDENCE, 3.

CONFLICT OF LAWS.

See EXECUTOR AND ADMINISTRATOR, 2.

CONSTITUTIONAL LAW.

A. OF THE UNITED STATES.

1. Section 3894 of Revised Statutes, as amended by the act of September 19, 1890, 26 Stat. 465, c. 908, which provides that "no letter, postal card or circular concerning any lottery . . . and no list of the drawings at any lottery . . . and no lottery ticket or part thereof . . . shall be carried in the mail, or delivered at or through any post-office, or branch thereof, or by any letter-carrier"; and that no newspaper "containing any advertisement of any lottery" "shall be carried in the mail, or delivered by any postmaster or letter-carrier"; and that "any person who shall knowingly deposit or cause to be deposited . . . anything to be conveyed or delivered by mail in violation of this section . . . shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine of not more than five hundred dollars or by imprisonment for not more than one year," is a constitutional exercise of the power conferred upon Congress by Article I, sec. 8 of the Constitution, to establish post-offices and post-roads, and does not abridge "the freedom of speech or of the

press," within the meaning of Amendment I to the Constitution. *In re Rapier*, 110.

2. An ordinance of a city, imposing, pursuant to a Statute of the State, a license tax, for the business of running any horse or steam railroad for the transportation of passengers, does not impair the obligation of a contract, made before the passage of the statute, by which the city sold to a railroad company for a large price the right of way and franchise for twenty-five years to run a railroad over certain streets and according to certain regulations, and the company agreed to pay to the city annually a real estate tax, and the city bound itself not to grant, during the same period, a right of way to any other railroad company over the same streets. *New Orleans City & Lake Railroad Co.* v. *New Orleans*, 192.
3. Sec. 3894, Rev. Stat. as amended by the act of September 19, 1890, 26 Stat. 465, c. 908, is constitutional, under the decision in *Ex parte Rapier*, 143 U. S. 110. *Horner* v. *United States*, No. 1, 207.
4. The statute of New York of May 26, 1881, (Laws of 1881, c. 361,) imposing a tax upon the corporate franchise or business of every corporation, joint-stock company or association incorporated or organized under any law of the State or of any other State or country, to be computed by a percentage upon its whole capital stock, and to be ascertained in the manner provided by the act, when applied to a manufacturing corporation organized under the laws of Utah, and doing the greater part of its business out of the State of New York, and paying taxes in Illinois and Utah, but doing a small part of its business in the State of New York, does not tax persons or property not within the State; nor regulate interstate commerce; nor take private property without just compensation; nor deny to the corporation the equal protection of the laws; nor impose a tax beyond the constitutional power of the State: and the remedy of the corporation against hardship and injustice, if any has been suffered, must be sought in the legislature of the State. *Horn Silver Mining Co.* v. *New York*, 305.
5. The cases respecting state taxation of foreign corporations reviewed. *Ib.*
6. The act of the legislature of Michigan of June 28, 1889, (Public Laws of 1889, pp. 282, 283,) fixing the amount per mile to be charged by railways for the transportation of a passenger, violates no provision in the Constitution of the United States, so far as disclosed by the record in this case. *Chicago & Grand Trunk Railway Co.* v. *Wellman*, 339.
7. A legislature has power to fix rates for the transportation of passengers by railways, and the extent of judicial interference is protection against unreasonable rates. *Ib.*
8. Courts should be careful not to declare legislative acts unconstitutional upon agreed and general statements, and without the fullest disclosure of all material facts. *Ib.*
9. Whenever, in the pursuance of an honest antagonistic assertion of rights there is presented a question involving the validity of any act of any

legislature, State or Federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must determine whether the act be constitutional or not; but it never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act. *Ib.*

10. An act of the legislature of New York (Laws of 1888, chap. 581) provided that the maximum charge for elevating, receiving, weighing and discharging grain should not exceed five-eighths of one cent a bushel; and that, in the process of handling grain by means of floating and stationary elevators, the lake vessels or propellers, the ocean vessels or steamships, and canal boats, should only be required to pay the actual cost of trimming or shovelling to the leg of the elevator when unloading, and trimming cargo when loading; *Held*, that the act was a legitimate exercise of the police power of the State over a business affected with a public interest, and did not violate the Constitution of the United States, and was valid. *Budd* v. *New York*, 517.
11. Although the act of New York did not apply to places having less than 130,000 population, it did not deprive persons owning elevators in places of 130,000 population or more, of the equal protection of the laws. *Ib.*
12. Although it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without his consent, that principle has no application to a suit by one government against another government. *United States* v. *Texas*, 621.
13. The exercise by this court of original jurisdiction in a suit brought by one State against another to determine the boundary line between them, or in a suit brought by the United States against a State to determine the boundary between a Territory of the United States and that State, so far from infringing, in either case, upon the sovereignty, is with the consent of the State sued. *Ib.*
14. The signing by the Speaker of the House of Representatives and by the President of the Senate, in open session, of an enrolled bill, is an official attestation by the two Houses of such bill as one that has passed Congress; and when the bill thus attested receives the approval of the President, and is deposited in the Department of State according to law, its authentication as a bill that has passed Congress is complete and unimpeachable. *Field* v. *Clark*, 649.
15. It is not competent to show from the journals of either House of Congress, that an act so authenticated, approved and deposited, did not pass in the precise form in which it was signed by the presiding officers of the two Houses and approved by the President. *Ib.*
16. Congress cannot, under the Constitution, delegate its legislative power to the President. *Ib.*
17. The authority conferred upon the President by section 3 of the act of October 1, 1890, to reduce the revenue and equalize duties on imports,

and for other purposes, 26 Stat. c. 1244, pp. 567, 612, to suspend by proclamation the free introduction of sugar, molasses, coffee, tea and hides, when he is satisfied that any country producing such articles imposes duties or other exactions upon the agricultural or other products of the United States, which he may deem to be reciprocally unequal or unreasonable, is not open to the objection that it unconstitutionally transfers legislative power to the President, (FULLER, C. J., and LAMAR, J., dissenting;) but even if it were it does not follow that other parts of the act imposing duties upon imported articles, are inoperative. *Ib.*

18. The court does not decide whether the provision in that act respecting bounties upon sugar (schedule E, Sugar, 26 Stat. 583) is or is not constitutional, because it is plain from the act that these bounties do not constitute a part of the system of customs duties imposed by the act, and it is clear that the parts of the act imposing such duties would remain in force even if these bounties were held to be unconstitutionally imposed. *Ib.*

See CRIMINAL LAW, 3, 4, 7;
JURISDICTION, B, 6;
TAX AND TAXATION, 2.

CONTRACT.

In the interpretation of any particular clause of a contract, the court is not only at liberty, but required, to examine the entire contract, and may also consider the relations of the parties, their connection with the subject matter of the contract, and the circumstances under which it was made. *Chicago, Rock Island &c. Railway* v. *Denver & Rio Grande Railroad*, 596.

See NATIONAL BOARD OF HEALTH; REBELLION, 1, 2;
RAILROAD, 3; TAX AND TAXATION, 2, 3.

CORPORATION.

See LOCAL LAW.

COSTS.

See JURISDICTION, C, 1.

COURT AND JURY.

See CHARGE TO THE JURY;
MINERAL LAND, 1 (3).

CRIMINAL LAW.

1. Under § 3894 of the Revised Statutes, as amended by the act of September 19, 1890, c. 908, (26 Stat. 465,) in regard to the carriage of lottery matter in the mail, it is an offence to cause a lottery circular,

mailed at the city of New York, and addressed there to a person in Illinois, to be delivered to such person in Illinois, by mail, and an indictment for so doing is triable in Illinois. *Horner* v. *United States*, No. 1, 207.

2. At common law it was deemed essential in capital cases that inquiry be made of the defendant before judgment was passed whether he had anything to say why sentence of death should not be pronounced upon him; thus giving him an opportunity to allege any ground of arrest, or to plead a pardon if he had obtained one, or to urge any legal objection to further proceedings against him. And if the record did not show that such privilege was accorded to him the judgment would be reversed. *Schwab* v. *Berggren*, 442.
3. This rule, however, does not apply to an appellate court, which, upon review of the proceedings in the trial court, merely affirms a final judgment, without rendering a new one. Due process of law does not require his presence in the latter court at the time the judgment sentencing him to death is affirmed. *Ib.*
4. Neither the statutes of Illinois nor due process of law, require that the accused, upon the affirmance of the judgment sentencing him to death, shall be sentenced anew by the trial court. The judgment is not vacated by the writ of error; only its execution is stayed pending proceedings in the appellate court. *Ib.*
5. The time and place of executing the sentence of death is not strictly part of the judgment unless made so by statute. *Ib.*
6. The governor of Illinois has power under the constitution of that State, to commute the punishment of death to imprisonment for life in the penitentiary. *Ib.*
7. F. was convicted of murder, in the Criminal Court of Cook County, Illinois, and sentenced by that court to suffer the penalty of death. Upon writ of error to the Supreme Court of Illinois, that judgment was affirmed and the day fixed in the original judgment for carrying the sentence into execution having passed, that court fixed another day. After the expiration of the term the accused applied for a correction of the record of the Supreme Court, so as to show that he was not present in that court when the original judgment was affirmed, and another day fixed for the execution. The application was denied upon the ground, in part, that amendments of the record of the court in derogation of the final judgment could not be allowed at a subsequent term. *Held*, (1) That the law of Illinois, as declared by its highest court, in respect to amendments of the record, was applicable to all persons within the jurisdiction of that State, and its enforcement against the plaintiff in error was not a denial to him by the State of the equal protection of the laws; (2) That due process of law did not require the presence of the accused in the appellate court when the original judgment of the trial court was affirmed, and a new day fixed for his execution. *Fielden* v. *Illinois*, 452.

CUSTOMS DUTIES.

See CONSTITUTIONAL LAW, A, 17, 18; STATUTE, B, 4.

DILIGENCE.

See LACHES.

DISCOVERY.

See EQUITY, 1.

DISTRICT OF COLUMBIA.

1. Section 854 of Rev. Stat. Dist. Columb., providing that "no person shall be appointed to office, or hold office in the police force [of the District of Columbia] who cannot read and write the English language, or who is not a citizen of the United States, or who shall ever have been indicted and convicted of crime; and no person shall be appointed as policeman or watchman who has not served in the army or navy of the United States and received an honorable discharge" was repealed by the act of June 11, 1878, "providing a permanent form of government for the District of Columbia." 20 Stat. 102, c. 180. *District of Columbia* v. *Hutton*, 18.
2. *Eckloff* v. *District of Columbia*, 135 U. S. 240, affirmed as to the point that the act of June 11, 1878, 20 Stat. 102, c. 180, supplied to the District of Columbia for the first time a permanent form of government in the nature of a constitution. *Ib.*

EJECTMENT.

See JURISDICTION, C, 2.

EQUITY.

1. A decree in a suit in equity found that T., an individual defendant, and the remaining assets of a corporation defendant, were liable to the plaintiff for the sum of $10,000 paid by him into the treasury of the company, at the instance of T., for a certificate of stock therein, which company was represented to him by T., who was its president, to be in a flourishing condition, when, in fact, it was insolvent; and distributed $176.24 as the remaining assets of the company, of which $13.24 went to the plaintiff as a credit on his claim for $10,000; and decreed that T. pay to the plaintiff $10,000, subject to a credit of the $13.24. There was no demurrer to the bill for multifariousness, and no objection taken in the court below for want of equity. The bill set out fraud in T., and that the $10,000 was due to the plaintiff by T. and the company, and required answers to interrogatories, which answers referred to the books of the company for information: *Held*, (1) To support jurisdiction in equity, there were in the case discovery, account, fraud, misrepresentation and concealment; the objection to the jurisdiction was not taken in the court below; and the case was not

one of a plain defect of equity jurisdiction, under § 723 of the Revised Statutes; (2) The decree was not outside of the case made by the bill, but gave relief agreeable to it, under the prayer for general relief; (3) The evidence sustained the decree, and the report of a master, finding in favor of the plaintiff the facts on which the decree was based, was not excepted to by T. *Tyler* v. *Savage*, 79.

2. A court of equity will not aid a party whose application is destitute of conscience, good faith and reasonable diligence, but will discourage stale demands, for the peace of society, by refusing to interfere where there has been gross laches in prosecuting rights, or where long acquiescence in the assertion of adverse rights has occurred; and in these respects each case must be governed by its own circumstances. *Hammond* v. *Hopkins*, 224.

3. A suit in equity being appropriate for determining the boundary between two States, the fact that the present suit is in equity, and not at law, is no valid objection to it. *United States* v. *Texas*, 621.

See EVIDENCE, 4; RAILROAD, 2, 3;
LACHES; TRUST, 1, 2.

EVIDENCE.

1. On the trial of an action to recover from a carrier freights improperly collected from the consignees on shipments by plaintiff, the plaintiff, who was his own witness, was asked several questions with the apparent design of showing that he had had other transactions with the defendant, upon which he was indebted to defendant, and that there was a judgment pending against him in favor of defendant. *Held*, that these questions were not admissible. *National Steamship Co.* v. *Tugman*, 28.

2. It being shown that a paper was served as a copy of an affidavit on behalf of the defendant, with an order to show cause in the action on trial, it is thereby sufficiently authenticated to enable it to be read in evidence against him, and it is competent evidence on behalf of the plaintiff as an admission by the defendant that the facts stated in the affidavit are true. *Ib.*

3. Parol evidence of what is said between a passenger on a railroad and the ticket-seller of the company, at the time of the purchase by the passenger of his ticket, is admissible as going to make up the contract of carriage and forming part of it. *Erie Railroad Co.* v. *Winter*, 60.

4. In order to justify a court in refusing to enforce a settlement of a quarrel between the members of a large family, growing out of disputes about the wills of their father and other members of the family, and out of money transactions between brothers and sisters, upon the ground that the settlement was obtained by misrepresentation, active or covert, or that it failed to express the real intent of the parties, the

testimony should establish the fact clearly and satisfactorily; and in this case it is not so established. *Chandler* v. *Pomeroy*, 318.

See CONSTITUTIONAL LAW, A, 15;
MINERAL LAND.

EXCEPTION.

After the term at which a trial took place has expired, without the court's control over the case being reserved by standing rule or special order, and especially after a writ of error has been entered in this court, the court below cannot allow a bill of exceptions then first presented, or amend a bill of exceptions already allowed and filed. *Michigan Insurance Bank* v. *Eldred*, 293.

EXECUTOR AND ADMINISTRATOR.

1. An administrator, appointed in one State, who, after appearing and having judgment rendered against him as such in a suit in equity brought in another State, the laws of which authorize a foreign administrator to sue there, files a bill of review in the same court to reverse the decree, for the reason that, not being an administrator appointed by the courts of that State, he could not be sued there, is bound by the original judgment against him, if his bill of review is dismissed for want of equity. *Lawrence* v. *Nelson*, 215.
2. The general equity jurisdiction of the Circuit Court of the United States to administer, as between citizens of different States, the assets of a deceased person within its jurisdiction cannot be defeated or impaired by laws of a State undertaking to give exclusive jurisdiction to its own courts. *Ib.*

FICTITIOUS SUIT.

See CONSTITUTIONAL LAW, A, 9.

FRAUD.

See EQUITY, 1; LACHES;
EVIDENCE, 4; TRUST.

HABEAS CORPUS.

Where a person is committed in one district, by a United States commissioner, for trial in another, the question of his identity cannot be reviewed on *habeas corpus*. *Horner* v. *United States*, No. 1, 207.

INTERNAL REVENUE.

The stealing of distilled spirits from a distillery warehouse by reason of the omission of the internal revenue officers to provide sufficient locks on the doors affords no defence to an action on the distiller's bond to pay the tax due on the spirits before their removal and within three years from the date of entry. *United States* v. *Witten*, 76.

IOWA.

See RIPARIAN OWNER.

JURISDICTION.

A. OF COURTS OF THE UNITED STATES, GENERALLY.

An application to a court to review the action of the political department of the government, upon a question pending between it and a foreign power, and to determine whether the government was right or wrong, made while diplomatic negotiations are still going on, should be denied. *In re Cooper*, 472.

B. OF THE SUPREME COURT OF THE UNITED STATES.

1. When several plaintiffs claim under the same title, and the determination of the cause necessarily involves the validity of that title, and the whole amount involved exceeds $5000, this court has jurisdiction as to all such plaintiffs, though the individual claims of none of them exceed $5000: but where the matters in dispute are separate and distinct, and are joined in one suit for convenience or economy, the rule is the reverse as to claims not exceeding $5000. *New Orleans Pacific Railway Co.* v. *Parker*, 42.
2. It is not the province of this court to determine whether a verdict was excessive. *Erie Railroad Co.* v. *Winter*, 60.
3. The questions (1) whether it is settled law in the State of Minnesota that a judgment of dismissal in a former suit, such as is pleaded in this case, was not a bar to a second suit on the same cause of action; (2) whether the law in respect of recovery by a servant against his master for injuries received in the course of his employment was properly applied on the trial of a case, do not fall within the category of questions of such gravity and general importance as to require the review of the conclusions of the Circuit Court of Appeals in reference to them. *In re Woods, Petitioner*, 202.
4. The highest court of a State decided that a judgment of another court of the State, granting a petition to revive a judgment under a statute of limitations of the State authorizing this to be done upon citation "to the defendant or his representative," in order to prevent the running of the statute could not, at the suit of one claiming under the original defendant, be collaterally impeached because the only person cited was the assignee in bankruptcy of that defendant. *Held*, that the decision was not subject to review by this court on writ of error. *Ludeling* v. *Chaffe*, 301.
5. In this case, which was a writ of error to the Supreme Court of a State, it was contended that that court did not give to a judgment of a Circuit Court of the United States such faith and credit as it was entitled to under the Constitution and laws of the United States; and that it

disregarded the provision of the Constitution of the United States that no State shall pass any law impairing the obligation of a contract. *Held*, that the first contention was incorrect; that the question as to the impairment of the obligation of a contract was raised for the first time in this court, and was not accurate in fact; and that the writ of error must be dismissed. *Winona & St. Peter Railroad Co.* v. *Plainview*, 371.

6. On a complaint before a United States commissioner in New York, against H. for a criminal offence, in violation of § 3894 of the Revised Statutes, as amended by the act of September 19, 1890, c. 908, (26 Stat. 465,) prohibiting the sending by mail of circulars concerning lotteries, H. was committed to await the action of the grand jury. A writ of *habeas corpus* issued by the Circuit Court of the United States was dismissed by that court. H. appealed to this court in November, 1891. *Held*, (1) As the constitutionality of § 3894, as amended, was drawn in question, an appeal lay directly to this court from the Circuit Court, under § 5 of the act of March 3, 1891, c. 517, (26 Stat. 826 to 828, 1115;) (2) Under such an appeal, this court acquires jurisdiction of the entire case, and of all questions involved in it, and not merely of the question of constitutionality; (3) This court ought not to review the question whether the transaction complained of was an offence against the statute, because the commissioner had jurisdiction of the subject matter involved, and of the person of H.; (4) The statute is constitutional; (5) A statute is a law equally with a treaty, and, if subsequent to and conflicting with the treaty, supersedes the latter. *Horner* v. *United States*, No. 2, 570.

The Supreme Court of the United States has original jurisdiction of a suit in equity brought by the United States against a State to determine the boundary between that State and a Territory of the United States, and that question is susceptible of judicial determination. *United States* v. *Texas*, 621.

See BEHRING SEA;
NATURALIZATION.

C. OF CIRCUIT COURTS OF THE UNITED STATES.

1. In a case reversed in this court and remanded to a state court upon the ground that that court had lost its jurisdiction by petition and bond for removal, the propriety of staying proceedings in the Circuit Court after removal, until costs adjudged in the state court are paid, is purely a matter of discretion in the Circuit Court. *National Steamship Co.* v. *Tugman*, 28.

2. The provision in the statute of Illinois, (Rev. Stats. c. 45, § 35,) that "at any time within one year after a judgment, either upon default or verdict in the action of ejectment, the party against whom it is rendered, his heirs or assigns, upon the payment of all costs recovered therein, shall be entitled to have the judgment vacated, and a new

trial granted in the cause" applies to such a judgment rendered in a Circuit Court of the United States, sitting within that State, on a mandate from this court in a case commenced in a court of the State of Illinois, and removed thence to the Circuit Court of the United States. *Smale* v. *Mitchell*, 99.

See EXCEPTION; EXECUTOR AND ADMINISTRATOR, 2.

D. OF DISTRICT COURTS.

1. The District Court for the District of Alaska has jurisdiction in admiralty to forfeit vessels for violating the provisions of Rev. Stat. § 1956 on any of the navigable waters of the United States which were acquired by the treaty with Russia, concluded March 30, 1857, 15 Stat. 539. *In re Cooper*, 472.
2. United States District Courts, sitting in admiralty, are courts of superior jurisdiction, and every intendment is made in favor of their decrees; and when it appears that the court had jurisdiction of the subject matter and either that the defendant was duly served with process or that he voluntarily appeared and made defence, the decree is not open collaterally to any inquiry upon the merits or jurisdiction dependent on those facts. *Ib.*
3. The latter part of section 7 of the act of May 17, 1884, 23 Stat. 24, 26, may be read as follows: "And the final judgments and decrees of said District Court of Alaska may be reviewed by the Supreme Court of the United States as in other cases;" and, being so read, its meaning is that this court may review the final judgments or decrees of that court, as in cases of the same kind from other courts. *Ib.*
4. The act of February 16, 1875, 18 Stat. 315, c. 77, § 1, applies to appeals taken from decrees of the District Court of the United States for the District of Alaska, sitting in admiralty. *Ib.*

See BEHRING SEA.

LACHES.

In all cases where actual fraud is not made out, but the imputation rests upon conjecture, where the seal of death has closed the lips of those whose character is involved, and lapse of time has impaired the recollection of transactions and obscured their details, the welfare of society demands the rigid enforcement of the rule of diligence. *Hammond* v. *Hopkins*, 224.

See EQUITY, 2;
TRUST, 1, 2, 3.

LOCAL LAW.

Under the Code of Wisconsin, an express denial, upon information and belief, that the plaintiff was, at or since the commencement of the action, or is now, a corporation, puts in issue the existence of the corporation. *Michigan Insurance Bank* v. *Eldred*, 293.

District of Columbia. *See* DISTRICT OF COLUMBIA.
Illinois. *See* CRIMINAL LAW, A, 4, 6, 7; JURISDICTION, C, 2; MORTGAGE.
Kentucky. *See* SALE; TAX AND TAXATION.
Michigan. *See* CONSTITUTIONAL LAW, A, 6.
Minnesota. *See* JURISDICTION, B, 3.
New York. *See* CONSTITUTIONAL LAW, 4, 10, 11.

LOTTERY.

See CONSTITUTIONAL LAW, A, 1; CRIMINAL LAW, 1; JURISDICTION, B, 6; MAILS, TRANSPORTATION OF.

MAILS, TRANSPORTATION OF.

Ex parte Jackson, 96 U. S. 727, affirmed to the points; (1) That the power vested in Congress to establish post-offices and post-roads embraces the regulation of the entire postal system of the country, and that under it Congress may designate what may be carried in the mail and what excluded; (2) That in excluding various articles from the mails the object of Congress is, not to interfere with the freedom of the press, or with any other rights of the people, but to refuse the facilities for the distribution of matter deemed injurious by Congress to the public morals; (3) That the transportation in any other way of matter excluded from the mails is not forbidden. *In re Rapier*, 110.

See CONSTITUTIONAL LAW, A, 1.

MISREPRESENTATION.

See EQUITY, 1; EVIDENCE, 4.

MISSOURI RIVER.

See RIPARIAN OWNER, 2.

MINERAL LAND.

In ejectment for the possession of a mine. The plaintiff claimed under a placer patent, issued January 30, 1880, on an application made November 13, 1878, and entry and payment made February 21, 1879. The defendant claimed under a location certificate of a lode issued to one Goodale, dated March 10, and recorded March 11, 1879, reciting a location February 1, 1879. The defendant, to maintain its claim, offered the testimony of several witnesses, which this court holds to establish that in 1877, and more than a year before any proceedings were initiated with reference to the placer patent, the grantors of defendant entered upon and ran a tunnel some 400 feet in length into and through that ground which afterwards was patented as the placer

tract; and that in running such tunnel they intersected and crossed three veins, one of which was thereafter, and in 1879, located as the Goodell vein or lode. The vein thus crossed and disclosed by the tunnel was from seventy-five to seventy-eight feet from its mouth, of about fifteen inches in width, with distinct walls of porphyry on either side, a vein whose existence was obvious to even a casual inspection by any one passing through the tunnel. At the trial the court ruled that if the vein was known to the placer patentee at or before entry and payment, although not known at the time of the application for the patent, it was excepted from the property conveyed by the patent. *Held*,

(1) That this vein was a known vein at the time of the application for the placer patent;

(2) That the plaintiff was bound to know of the existence of the tunnel, and what an examination of it would disclose;

(3) That it was a question for the jury whether there was sufficient gold or silver within the vein to justify exploitation, and to be properly a "known vein or lode" within the meaning of Rev. Stat. § 2333;

(4) That the time at which the vein or lode within the placer must be known in order to be excepted from the grant of the placer patent is the time at which the application for that patent was made; but that the plaintiff suffered no injury from the error in the instruction of the court below in that respect, as the facts which implied knowledge at the time of the entry and payment existed also at and before the date of the application;

(5) That the neglect of the parties who ran the tunnel to at once develop the vein was of no account, as it appeared that there was a prevalent belief that a rich blanket vein was underlying the entire country, and this was the object of pursuit by all;

(6) That the admission of evidence respecting that blanket vein was immaterial, as the attention of the jury was directed by the court to the vein disclosed by the tunnel as the known vein, upon which the rights of defendant rested. *Iron Silver Mining Co.* v. *Mike & Starr Gold and Silver Mining Co.*, 394.

2. A placer patent conveys to the patentee full title to all lodes or veins within the territorial limits not then known to exist; and mere speculation and belief, based, not on any discoveries in the placer tract, or any tracings of a vein or lode adjacent thereto, but on the fact that quite a number of shafts, sunk elsewhere in the district, had disclosed horizontal deposits of a particular kind of ore, which, it was argued, might be merely a part of a single vein of continuous extension through all that territory, is not the knowledge required by the law. *Sullivan* v. *Iron Silver Mining Co.*, 431.

MISREPRESENTATION.

See EQUITY, 1;
EVIDENCE, 4.

MORTGAGE.

Under the law of Illinois, a grantee who by the terms of an absolute conveyance from the mortgagor assumes the payment of the mortgage debt, is liable to an action at law by the mortgagee; the relation of the grantee and the grantor towards the mortgagee is that of principal and surety; and therefore a subsequent agreement of the mortgagee with the grantee, without the assent of the grantor, extending the time of payment of the mortgage debt, discharges the grantor from all personal liability for that debt. *Union Mut. Life Ins. Co.* v. *Hanford*, 187.

See RAILROAD, 1, 2.

NATIONAL BANK.

The conversion of a state bank into a national bank, with a change of name, under the National Banking Act, does not affect its identity, or its right to sue upon liabilities incurred to it by its former name. *Michigan Insurance Bank* v. *Eldred*, 293.

NATIONAL BOARD OF HEALTH.

The National Board of Health had no authority to incur any liability upon the part of the government for salaries or other expenses in excess of the amounts appropriated by Congress for such purposes; and the plaintiff in error did not perform services as a member of that board, or as its chief clerk, or its secretary, or as a disbursing agent of the Treasury Department under any implied contract that he should be compensated otherwise than out of the moneys specifically appropriated to meet the expenses incurred by the board in the performance of the duties imposed upon it. *Dunwoody* v. *United States*, 578.

NATURALIZATION.

Boyd was born in Ireland in 1834, of Irish parents. His father emigrated to the United States in 1844, with all his family, and settled in Ohio, in which State he has since resided continuously. In 1849 the father duly declared his intention to become a citizen of the United States, but there is no record or other written evidence that he ever completed his naturalization by taking out his naturalization certificate after the expiration of the five years. For many years after the expiration of that time, however, he exercised rights and claimed privileges in Ohio, which could only be claimed and exercised by citizens of the United States and of the State. The son, on attaining majority, voted in Ohio, under the belief that his father had become a citizen. In 1856 he removed to Nebraska, in which State he resided continuously until the commencement of this action. He voted there at all elections, held various offices there which required him to take an oath to support the Constitution of the United States, served in the army during the war, was a member of a convention to frame a state constitution, was mayor of Omaha and, after thirty years of unquestioned exercise of such

rights and privileges, was elected governor of the State of Nebraska, receiving a greater number of votes than any other person voted for. He took the oath of office, and entered on the discharge of its duties. His predecessor, as relator, filed an information in the Supreme Court of Nebraska, in which were set forth the facts as to the declaration of intention by Boyd's father, and it was further averred that the father did not become a citizen during the son's minority, nor until the October term of the Court of Common Pleas in Muskingum County, Ohio, in the year 1890, when the son was 56 years of age, and it was claimed that Boyd, the son, never having himself been naturalized, was not, at the time of his election, a citizen of the United States, and was not, under the constitution and laws of Nebraska, eligible to the office of governor of that State, and the relator therefore prayed judgment that Boyd be ousted from that office, and that the relator be declared entitled to it until a successor could be elected. To this information the respondent, in his answer, after stating that his father, on March 5, 1849, when the respondent was about 14 years of age, made before a court of the State of Ohio his declaration of intention to become a citizen of the United States, and averring "that his father, for 42 years last past has enjoyed and exercised all of the rights, immunities and privileges and discharged all the duties of a citizen of the United States and of the State of Ohio, and was in all respects and to all intents and purposes a citizen of the United States and of the State of Ohio," and particularly alleging his qualifications to be a citizen, and his acting as such for forty years, voting and holding office in that State, further distinctly alleged "on information and belief, that prior to October, 1854, his father did in fact complete his naturalization in strict accordance with the acts of Congress known as the naturalization laws, so as to admit and constitute him a full citizen thereunder, he having exercised the rights of citizenship herein described, and at said time informed respondent that such was the fact. To this answer the relator interposed a demurrer, and on these pleadings the court below entered a judgment of ouster against Boyd, to which judgment a writ of error was sued out from this court. *Held*,

(1) That as the defence relied on arose under an act of Congress, and presented a question of Federal law, this court had jurisdiction to review it;

(2) That the fact that the respondent's father became a citizen of the United States was well pleaded, and was admitted by the demurrer;

(3) That upon this record Boyd had been for two years, next preceding his election to the office of governor, a citizen of the United States and of the State of Nebraska;

(4) That where no record of naturalization can be produced, evidence that a person having the requisite qualifications to become a citizen did in fact and for a long time vote, and hold office, and exercise rights belonging to citizens, is sufficient to warrant a jury in inferring that he has been duly naturalized as a citizen.

And it was further, *Held*, by FULLER, C. J., and BLATCHFORD, LAMAR, and BREWER, JJ.:

(5) That, the Supreme Court having denied to Boyd a right or privilege existing under the Constitution of the United States, this court had jurisdiction, on that ground also, to review the judgment of the Supreme Court of Nebraska;

(6) That, even if the father did not complete his naturalization before the son attained majority, the son did not lose the inchoate status which he had acquired through his father's declaration of intention to become a citizen, and that he occupied in Nebraska the same position which his father would have occupied had he emigrated to that State;

(7) That within the intent and meaning of the acts of Congress he was made a citizen of the United States and of the State of Nebraska under the organic and enabling acts of Congress, and the act admitting that State into the Union;

(8) That Congress has the power to effect a collective naturalization on the admission of a State into the Union, and did so in the case of Nebraska;

(9) That the admission of a State on an equal footing with the original States involves the adoption, as citizens of the United States, of those whom Congress makes members of the political community, and who are recognized as such in the formation of the new State with the assent of Congress;

(10) That the rule prescribed by § 4 of the act of April 14, 1802, 2 Stat. 155, c. 28, was to be a uniform rule, and there was no reason for limiting such a rule to the children of those who had been already naturalized, but, on the contrary, the intention was that the act of 1802 should have a prospective operation. *Boyd* v. *Thayer*, 135.

NEBRASKA.

See RIPARIAN OWNER.

NEW TRIAL.

If the whole evidence introduced by the defendant upon one issue is incompetent to support it, and is admitted and considered against the plaintiff's exception, and the judge, by ruling that this evidence is decisive against the plaintiff's right to recover, without regard to another issue in the case, induces the plaintiff not to put in evidence on the other issue, the plaintiff is entitled to a new trial, although he has not also excepted to a direction to return a verdict for the defendant. *Michigan Insurance Bank* v. *Eldred*, 293.

PATENT FOR INVENTION.

1. The invention secured to Joseph F. Glidden by letters patent No. 157,124, dated November 24, 1874, for an improvement in wire fences, involved invention, and the patent therefor is valid. *Barbed Wire Patent*, 275.

2. Courts incline to sustain a patent to the man who takes the final step in the invention which turns failure into success. *Ib.*
3. When an unpatented device, the existence and use of which are proven only by oral testimony, is set up as a complete anticipation of a patent, the proof sustaining it must be clear, satisfactory, and beyond a reasonable doubt. *Ib.*
4. Letters patent No. 228,186, issued June 1, 1880, to Maurice Gandy, for an improved belt or band for driving machinery and an improved mechanical process for manufacturing the same, are valid, and the novelty and utility of the invention protected by it are not disturbed by the evidence in this case. *Gandy* v. *Main Belting Co.*, 587.
5. The "public use or sale" of an invention "for more than two years prior to" the "application" for a patent for it, contemplated by section 4886 of the Revised Statutes as a reason for not issuing the patent or for its invalidation if issued, must be limited to a use or sale in this country. *Ib.*

POST OFFICE DEPARTMENT.

See CONSTITUTIONAL LAW, A, 1;
MAILS, TRANSPORTATION OF.

PLACE OF TRIAL.

See CRIMINAL LAW, 1.

PLEADING.

See LOCAL LAW;
NATURALIZATION.

PRACTICE.

As the judgment in this case rests upon a sound principle of law this court affirms it, although it was put by the court below upon an unsound principle. *Sullivan* v. *Iron Silver Mining Co.*, 431.

See CHARGE TO JURY;
EXCEPTION;
NEW TRIAL.

PRINCIPAL AND SURETY.

See MORTGAGE.

PROHIBITION, WRIT OF.

1. Prohibition will not go after judgment and sentence, unless want of jurisdiction appears on the face of the proceedings; but, before judgment, the superior court can examine not simply the process and pleadings technically of record, but also the facts and evidence upon which action was taken. *In re Cooper*, 472.

2. On an application for a writ of prohibition, the inquiry being confined to the matter of jurisdiction, only the record proper should be looked into, and not documents and other evidence in addition to the record which may be sent up under the provisions of Rev. Stat. § 698. *Ib.*
3. When a party aggrieved by a judgment has an appeal to this court which becomes inefficacious through his neglect, a writ of prohibition to prevent the enforcement of the judgment will not issue from this court. *Ib.*

See BEHRING SEA.

PUBLIC LAND.

1. The grant of public land to the State of Iowa by the act of May 15, 1856, 11 Stat. 9, c. 28, "in alternate sections to aid in the construction of certain railroads in that State" was a grant *in præsenti*, which did not attach until the time of the filing of the map of definite location, although the beneficiary company (under the Iowa statute) may have surveyed and staked out upon the ground a line of its own road. *Sioux City & Iowa Falls Land Co.* v. *Griffey*, 32.
2. The plaintiff, claiming under the said grant to the State of Iowa, brought an action against the defendant to recover a tract, a part of the grant. The defendant claimed under a patent from the United States subsequent to the filing of the map of definite location, but issued on a preëmption claim made prior thereto, and filed a cross-bill for quieting his title. *Held*, that it was not open to the plaintiff to contest the *bona fides* of the preëmption settlement. *Ib.*
3. A grant to a railroad company of public lands, within defined limits, not sold, reserved or otherwise disposed of when the route of the road becomes definitely fixed, conveys no title to any particular land until the location, and until the specific parcels have been selected by the grantee and approved by the Secretary of the Interior. *New Orleans Pacific Railway Co.* v. *Parker*, 42.

See MINERAL LAND.

RAILROAD.

1. A mortgage by a railroad company of its railroad, rights of way, roadbed and all its real estate then owned or which might be thereafter acquired appurtenant to or necessary for the operation of the railroad, and all other property wherever situated in the State, then owned or which might thereafter be acquired by the company, and which should be appurtenant to or necessary or used for the operation of its road, and also the tenements, hereditaments and appurtenances thereunto belonging, does not cover a grant of lands within the State subsequently made by Congress to the company in aid of the construction of its road. *New Orleans Pacific Railway Co.* v. *Parker*, 42.
2. If a holder of one or more of a series of bonds issued by a railroad com-

pany and secured by a mortgage in terms like this mortgage has a right to institute proceedings for the foreclosure of the mortgage, (about which no opinion is expressed,) he is bound to act for all standing in a similar position, and not only to permit other bondholders to intervene, but to see that their rights are protected in the final decree. *Ib.*

3. The Chicago, Rock Island and Colorado Railway Company contracted with the Denver and Rio Grande Railroad Company for the use by the former of the tracks, stations, sidings, switches, etc. of the latter company between Colorado Springs and Denver, (except its shops at Burnham,) and also for its terminal facilities at Denver, and, having so contracted made its connections and entered on the enjoyment of its rights under the contract. Shortly afterwards the Chicago, Rock Island and Pacific Railway Company was organized and acquired the property and rights of the Chicago, Rock Island and Colorado Railway and entered into the enjoyment of them, and its rights were recognized by the Denver and Rio Grande Railroad Company. The Rock Island and Pacific Company then acquired a right to connect with the Union Pacific Railroad Company at Limon, and to run its Eastern trains over the tracks of the latter company to Denver, which it did. The distance from Limon to Denver by this route was sixty-four miles less than by the way of Colorado Springs and the Denver and Rio Grande road. Although it had diverted its Denver traffic it continued to use the Rio Grande road for its Pueblo traffic, and it claimed the use of the terminal facilities of that road at Denver for all, and also of some land at Burnham not actually used for shops. It also claimed the right under the contract to put in its own switching forces and cleaning gangs. The Denver and Rio Grande Company then gave notice that it would exclude from the Denver terminals all business coming over the Union Pacific tracks. Thereupon the Rock Island Company filed a bill in equity and obtained a restraining order. By amendments and supplemental bills there were brought into the controversy other matters of difference between the two companies and a final decree was made settling their rights under the contract as follows: (1), that the new Rock Island Company was the successor of the old, and had the right under the contract to operate its trains over the Rio Grande Company's line; (2), that it had not the right, under the contract, to bring its trains to the Denver terminals over the Union Pacific; (3), that it had the right to employ separate switching crews and separate employés to perform other services in the yards of the Rio Grande Company under the control and subject to the direction of the agent of that company; (4), that the words "shops at Burnham" in the contract included all lands used or procured for shop purposes and appurtenant to the shops located at Burnham; (5), that a track should be set apart at Denver on which the Kansas Pacific Company might clean its cars; (6), that each party should pay one-half of all

costs. On appeal this court *Held*, (1) That the plaintiff was entitled to file this bill; (2) That it was never intended to grant the use of terminal facilities for the Rock Island Road, except as appurtenant to the use by it of the Rio Grande road; (3) That the exception of the shops at Burnham not only included the buildings actually used for mechanical purposes, but also two tracts purchased for the use of the shops, and intended to be devoted to such purposes; (4) That there was no error in the decree of the court below as to the employment of separate switching crews; (5) That the cleaning of the cars could be done by the Rock Island Company, but the Rio Grande Company was bound to furnish track facilities for it; (6) That it was not necessary to decide questions raised as to the discharge of employés engaged in the operation of that part of the road jointly occupied and used under the contract. *Chicago, Rock Island & Pacific Railway* v. *Denver & Rio Grande Railroad.*

See COMMON CARRIER;
CONSTITUTIONAL LAW, A, 2, 6, 7;
EVIDENCE, 3;
PUBLIC LAND, 3.

REBELLION.

1. During the civil war two citizens of the United States, residing in loyal States, could make a valid contract for the sale or mortgage of cotton growing on a plantation within one of the insurgent States, and such a contract would pass existing cotton on the plantation, and also crops to be subsequently raised thereon. *Briggs* v. *United States*, 346.
2. The contract in this case for the sale of cotton growing and to be grown did not come within the statute of frauds, and the only question to be decided is whether it was a contract of sale or a contract of mortgage. *Ib.*
3. The captured and abandoned property act was a surrender by the United States of its rights as a belligerent to appropriate property of a particular kind taken in the enemy's country, and belonging to a loyal citizen. *Ib.*

RIPARIAN OWNER.

1. When grants of land border on running water, and the banks are changed by the gradual process known as accretion, the riparian owner's boundary line still remains the stream; but when the boundary stream suddenly abandons its old bed and seeks a new course by the process known as avulsion, the boundary remains as it was, in the centre of the old channel: and this rule applies to a State when a river forms one of its boundary lines. *Nebraska* v. *Iowa*, 359.
2. The law of accretion controls on the Missouri River, as elsewhere; but the change in the course of that river in 1877 between Omaha and

Council Bluffs does not come within the law of accretion, but within that of avulsion. *Ib.*

SALARY.

See NATIONAL BOARD OF HEALTH.

SALE.

In Kentucky the common law rule prevails that a sale of personal property is complete, and title passes as between vendor and vendee, when the terms of transfer are agreed upon, without actual delivery. *Briggs* v. *United States*, 346.

SETTLEMENT.

See EVIDENCE, 4.

STATUTE.

A. GENERALLY.

See CONSTITUTIONAL LAW, A, 14, 15.

B. CONSTRUCTION OF STATUTES.

1. *United States* v. *Tynen*, 11 Wall. 8, quoted and applied to the points: (1) that when there are two acts on the same subject effect is to be given to both, if possible; (2) that when two acts on the same subject are repugnant, the later operates to repeal the earlier to the extent of the repugnancy; and (3) that a later act, covering the whole subject of an earlier one, and embracing new provisions, showing that it was intended as a substitute for the earlier act, operates as a repeal of that act. *District of Columbia* v. *Hutton*, 18.
2. When a later act operates as a repeal of an earlier act of Congress, a subsequent recognition of it by Congress as a subsisting act will not operate to prevent the repeal. *Ib.*
3. Courts should be careful not to declare legislative acts unconstitutional upon agreed and general statements, and without the fullest disclosure of all material facts. *Chicago & Grand Trunk Railway Co.* v. *Wellman*, 339.
4. Unless it be impossible to avoid it, a general revenue statute should never be declared inoperative in all its parts because a particular part, relating to a distinct subject, may be invalid. *Field* v. *Clark*, 649.

C. STATUTES OF THE UNITED STATES.

See ALIEN IMMIGRANT;
CONSTITUTIONAL LAW, A, 1, 3, 17, 18;
CRIMINAL LAW, 1;
DISTRICT OF COLUMBIA, 1, 2;
EQUITY, 1;
JURISDICTION, B, 6; D, 1, 3, 4;
MINERAL LAND, 1;
NATIONAL BOARD OF HEALTH;
NATURALIZATION;
PATENT FOR INVENTION, 5;
PROHIBITION, WRIT OF, 2;
PUBLIC LAND, 1;
REBELLION, 3.

D. STATUTES OF THE STATES AND TERRITORIES.

Illinois. *See* CRIMINAL LAW, A, 4; JURISDICTION, C, 2.
Kentucky. *See* TAX AND TAXATION.
Louisiana. *See* CONSTITUTIONAL LAW, A, 2.
Michigan. *See* CONSTITUTIONAL LAW, A, 6.
New York. *See* CONSTITUTIONAL LAW, A, 4, 10, 11.
Wisconsin. *See* LOCAL LAW.

STATUTE OF FRAUDS.

See REBELLION, 2.

TAX AND TAXATION.

1. The immunity from taxation conferred upon the Louisville Water Company by the legislature of Kentucky by the act of April 22, 1882, 1 Sess. Acts, 1882, 915, was withdrawn by the general revenue act of May 17, 1886, Gen. Stats. 1888, c. 92. *Louisville Water Co.* v. *Clark*, 1.
2. The immunity from taxation granted to the company by the said act of 1882 was accompanied by the condition expressed in the act of February 14, 1856, 2 Rev. Stats. Ky. 121, and made part of every subsequent statute, when not otherwise expressly declared, that by amendment or repeal of the former act such immunity could be withdrawn. *Ib.*
3. The withdrawal of the exemption from taxation conferred upon the company by the act of 1882 put an end to the obligation imposed upon the company by that act, to furnish water free of charge to the city for the extinguishment of fires, cleansing of streets, etc. *Ib.*
4. The acquisition by the sinking fund of the city of the stock of the water company, whether before or after the passage of the act of 1882, was subject to the reserved power of the legislature, at its will to withdraw the exemption from taxation, by amending or repealing that act. *Ib.*

See CONSTITUTIONAL LAW, A, 2.

TRUST.

1. A purchase by a trustee of trust property, for his own benefit, is not absolutely void, but voidable; and it may be confirmed by the parties interested, either directly, or by long acquiescence, or by the absence of an election to avoid the conveyance within a reasonable time after the facts come to the knowledge of the *cestui que trust*. *Hammond* v. *Hopkins*, 224.
2. Two partners owned real estate in common, some of which was used in the partnership business. One died making the other by his will a trustee for the testator's children, with power of sale of all the real estate, and directing that the business be carried on. After carrying on the business for some time the trustee sold the real estate, by auction, and bought portions of it in through a third person, and ac-

counted for the half of the net proceeds. This transaction was open and was known to all the *cestui que trustent* and was objected to by none of them. *Held*, that there was nothing in all this to indicate fraud. *Ib.*

3. While it is true that a trustee cannot legally purchase on his own account that which his duty requires him to sell on account of his *cestui que trust*, nor purchase on account of the *cestui que trust* that which he sells on his own account, and that the *cestui que trust* may avoid such a sale even though made without fraud, and without injury to his interests, yet it is also true that such a transaction is not absolutely void in the sense that the purchaser takes no title, and that it may be ratified and affirmed by the *cestui que trust*, either directly or by acquiescence and silent approval; and, in such case, when he has ample notice of the facts, and waits before taking action to set the sale aside until he can see whether the transaction is like to prove a profitable speculation, he is guilty of laches, which amount to a ratification and approval. *Hoyt* v. *Latham*, 553.

VENDOR AND VENDEE.

See SALE.

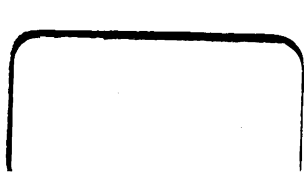
VERDICT.

See JURISDICTION, B, 2.

WILL.

A testator after giving the bulk of his property to his six brothers and sisters in equal shares, directed that "any and all notes, bills, accounts, agreements, or other evidences of indebtedness against any of my said brothers and sisters, held by me at the time of my decease, be cancelled by my said executors and delivered up to the maker or makers thereof, without payment of the same or any part thereof," except two notes specified and secured by mortgage. *Held*, that this direction did not include joint and several notes made to the testator between the date of the will and his death, by a partnership of which a brother was a member, to obtain money to carry on the business of the partnership, and secured by a conveyance of valuable property. *Waterman* v. *Alden*, 196.

See EVIDENCE, 4.

WRIT OF PROHIBITION.

See PROHIBITION, WRIT OF.